Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the Seventeenth *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Louisa Leiberich,
Appellant.

vs.

No. 18.

October Term, 1915

East St. Louis and Suburban Railway Company, a Corporation,
Appellee.

199 I.A. 1

~~ERROR TO~~
APPEAL FROM

City COURT

of East St. Louis. COUNTY

TRIAL JUDGE

HON. ROBERT H. FLANNIGAN.

Term No. 18. October Term, 1915. Agenda No.7.

Louisa Leiberich, Appellant.	)	
v.	)	Appeal from City Court
East St. Louis & Suburban Railway Company, Appellee.	)	of East St. Louis.

Opinion by Higbee, P. J.

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Appellant brought this action against appellee to recover damages for personal injuries alleged by her, to have been received while she was riding upon one of appellee's electric card in the city of East St. Louis. At the conclusion of all the evidence the court, upon appellee's motion, directed the jury to return a verdict of not guilty. Such a verdict was returned, a motion for a new trial was denied and judgment was entered against appellant for costs.

Upon this appeal, it is contended by appellant that there was sufficient evidence on her part, to prove the material allegations of her declaration, and although evidence for the appellee may have shown facts to the contrary, that it was error for the court to invade the province of the jury and determine the weight of the evidence. The declaration charged that ~~appellant~~ plaintiff was ~~being carried~~ a passenger on one of ~~appellee's~~ defendant's cars, ~~as a passenger;~~ that ~~said~~ the car was crowded and she was standing in the aisle, that as ~~said~~ the car turned a corner

Term No. 18. October Term, 1913. Agenda No.7.

Louisa Leiberich, Appellant. v. West St. Louis & Suburban Railway Company, Appellee.	Appeal from City Court of West St. Louis.

Opinion by Higbee, P. J.

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Appellant brought this action against appellee to recover damages for personal injuries alleged by her, to have been received while she was riding upon one of appellee's electric cars in the city of West St. Louis. At the conclusion of all the evidence the court, upon appellee's motion, directed the jury to return a verdict of not guilty. Such a verdict was returned, a motion for a new trial was denied and judgment was entered against appellant for costs.

Upon this appeal, it is contended by appellant that there was sufficient evidence on her part, to prove the material allegations of her declaration, and although evidence for the appellee may have shown facts to the contrary, that it was error for the court to invade the province of the jury and determine the weight of the evidence. The declaration charged that appellant was being carried on one of appellee's cars, ~~as a passenger;~~ that said car was crowded and she was standing in the aisle, that as said car turned a corner

near Thirteenth street and St. Clair Avenue, ~~in the city of~~ East St. Louis, Illinois, ~~appellees~~ defendants agents and servants ~~in charge of the same, carelessly and~~ negligently caused the car to run at ~~a~~ great ~~rate of~~ speed and turn violently around the corner, ~~thereby~~, throwing ~~appellant~~ defendant with great ~~force and~~ violence against the sides and upon the floor ~~of the car~~ and causing other passengers to fall upon and trample her; that on account of ~~the carelessness and~~ negligence ~~of appellee as aforesaid~~, ~~in throwing appellant in and about the car, causing her to be trampled upon by other passengers,~~ she sustained great and permanent injuries.

The evidence for ~~appellant~~ plaintiff showed that on March 28, 1915, ~~appellant~~ plaintiff and four acquaintances ~~got on a car of appellee~~ boarded defendant's car, about twenty minutes before midnight at Allens Park, ~~a pleasure resort~~ near East St. Louis, ~~upon~~ on the way to ~~her home in~~ St. Louis, Mo. The car was crowded and ~~appellant~~ plaintiff stood in the aisle near the back end. As the car reached the corner of Thirteenth street and Nectar Avenue, which appeared to have been somewhere near Thirteenth street and St. Clair avenue, it was running so fast that when it struck the curve, the trolley was thrown off, ~~and~~ the windows ~~were~~ broken, several persons ~~were~~ thrown from their seats, ~~appellant~~ plaintiff thrown ~~back~~ on the floor towards or upon the platform, and others thrown against or upon her. ~~Thereupon a number of passengers, including appellant, were taken from the car to a hospital in an ambulance, where they were examined and treated for such injuries as they appeared to have. Appellant left the hospital after she had had been examined by one of appellee's physicians, and went to the home of friends~~

in St. Louis, Missouri, and the next morning went to her own home in another part of the city. She testified ~~as to bodily injuries received by her and~~ that by reason of her injuries ~~caused by said accident~~, she had lost her health and become permanently injured. In regard to her injuries and their seriousness, she was corroborated by her physician in St. Louis. ~~Appellee claims that the evidence introduced~~ by it shows the falsity of appellant's claims and clearly established the fact that she was not standing at the time of the accident, but was sitting in a seat; that she did not leave the same and that she was not injured, but on these questions the testimony of appellant in support of her claim, was corroborated to a greater or less extent, by a number of witnesses introduced by her.

The evidence on the part of appellant was, if true sufficient to sustain a verdict in her behalf and it was the province of the jury, under proper instructions, and not the court, to determine whether it was disproved by the other evidence in the case. In directing the verdict it was necessary for the court to weigh the evidence and determine where the preponderance was and this the court could not rightfully do, as it deprived appellant of her constitutional right of trial by jury. Appellant contends, however, that the court was warranted in directing a verdict because of a fatal variance between the charge in the declaration and the proof, in that the declaration states that the accident happened at Thirteenth street and St. Clair avenue and that appellant's injuries were caused by her being trampled on,

while the proofs show the accident occurred at Thirteenth street and Nectar avenue and there was no proof that she was trampled upon. Appellant testified that the accident occurred somewhere around Thirteenth street and St. Clair avenue. How near it was to St. Clair avenue is not disclosed but appellant's testimony is sufficient to establish that it was in the same vicinity. Appellant had the same right of recovery for the injury incurred at one place as at the other and if the place was not clearly proven, as charged, the variance was technical and not of such importance as to defeat a right of recovery. In addition to the fact that the variance was trivial in its nature, it does not appear that the same was called to the attention of the court upon the trial of the case below, and the question cannot be raised for the first time in this court. City of East Dubuque v. Murhyte, 173 Ill.553; Alford v. Dannenberg, 76 Ill.App.376.

Nor was it necessary, under the declaration, for appellant to prove that she was trampled on by the other passengers, to entitle her to a recovery, as her injuries were not alleged to have been caused solely in that way, but also by reason of her having been thrown in and about the car. The statement of the tort charged in the declaration in this case, is divisible in its nature, and in torts it is the law that the plaintiff may prove a part of his charge if the averment is divisible and there be enough proof to support the case. City of Rock Island v. Cuinely 126 Ill.408: City of Joliet v. Johnson 177 Ill.178.

We are of opinion the trial court erred in directing verdict in favor of appellee and for that reason the judgment of that court will be reversed and the cause remanded.

Reversed and remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 24th *day of April A. D. 1916.*

Clerk of the Appellate Court.

OPINION

e $.....

199 I.A. 4

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the Seventeenth *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

E. S. Hausafus,
Appellee.

vs.

No. 20.

October Term, 1915

St. Louis, Springfield & Peoria
Railroad,
Appellant.

199 I.A. 4

~~ERROR TO~~
APPEAL FROM

City COURT

Granite City ~~COUNTY~~

TRIAL JUDGE

HON. M. R. SULLIVAN.

Term No. 20. October Term, 1915. Agenda No.37.

L. S. Hausafus, Appellee. v. St.Louis, Springfield and Peoria, Railroad. Appellant	Appeal from City Court of Granite City.

Opinion by Higbee, P. J.

-----oOo----

Appellee's automobile, in which he and four others were riding, was struck by one of appellant's cars at a public crossing in Madison county, and he brought this suit to recover damages to his car and for personal injuries received by him. The amended declaration contained three counts and charged in substance the negligence to have been in the running of the car at a high rate of speed as it approached the crossing and in giving no signal whatever of its approach; that at that place there were obstructions preventing persons along the highway from seeing the cars when approaching the crossing and this condition was known or could have been known to appellant by the exercise of reasonable care; that just before crossing said highway, appellant so carelessly and improperly drove and managed its said car that it ran into and struck the automobile of plaintiff, completely destroying

the same and injuring appellee. It was also alleged that appellee was at the time exercising due care for his own safety, that his son Homer Hausafus, who was driving the automobile was doing so with due care and caution for the safety of those riding in the same and for the safety of said automobile at the time of and just before going upon appellant's tracks. There was a plea of the general issue, a verdict in favor of appellee for $1775, a remittitur of $575 and judgment against appellant for $1200. Appellant, having brought the case here for review, relies for reversal on what is claimed to be the insufficiency of the evidence and excessiveness of the judgment.

It appeared ~~from the proofs~~ that in the forenoon of July 12, 1914, plaintiff ~~appellant~~ started in his five passenger automobile from his home in Granite City, Illinois, to take a ride in the country. On the front seat was his son ~~Homer, twenty years of age,~~ who was driving the car and a daughter ~~twenty three years old~~, while plaintiff ~~appellee~~ was sitting on the back seat with a friend, ~~Louis Fogrel~~ and a young daughter of the latter, ~~some six years of age~~. The top of the automobile was up and shortly after leaving the city limits, they were driving south on the Hamcoki public highway towards a place where defendants ~~appellant's~~ tracks cross the road at right angles, at a time when defendants ~~appellant's~~ car that caused the injury was approaching the crossing from the east. The physical conditions at and east of the crossing and north of the railroad track necessary for a proper consideration of the issues involved, ~~were fully brought out by the evidence and~~ were shown to be

[illegible]

substantially as follows: The highway and ~~appellant's~~ defendant's right of way which is sixty feet wide, cross at right angles, the highway running north and south, and ~~appellant's~~ defendant's right of way east and west. On the north the highway began to rise forty feet back from the crossing and gradully reached the elevation of the track which at the crossing was six feet above the natural surface of the ground. This same elevation above the natural surface of the ground, extended east of the crossing some 500 feet. On the west side of the highway was a warning sign. On the east side of the highway towards the car was a blue grass pasture, across which appellee would have to look if he saw the car before he reached the right of way. This pasture was separated from the highway by a hedge fence which ran to a point 32 feet north of the right of way, where there was a gate, and was on the natural surface of the ground. There were three persimmon trees near the right of way in the pasture, one of which was some fifty feet from the north rail of the track and the other two further away, from 15 to 18 feet distant from each other. East of the hedge fence some 525 feet, was a two story frame house which came within 12 feet of appellant's right of way, and across the 12 feet there was a shed. Along the right of way six feet from the north rail of the track were five telegraph poles between the house and the crossing, 100 feet apart. Around the house was a picket fence extending out to the right of way and there were a number of shade trees in the yard.

~~Appellee~~ Beauty and those with him, stated that were rid-

ing towards the crossing at a speed of 12 to 15 miles an hour and when some 300 feet distant therefrom, began to look in both directions for cars; that they continued looking and saw none until within six or seven feet of the track, when they saw a car from 100 to 150 feet away, running at 50 or 60 miles an hour, coming from the east; that the brakes of the automobile were immediately applied, but it was impossible to stop it until the front wheels reached the rail where the trolley car struck it, badly wrecking the automobile and injuring ~~appellee~~ plaintiff and some of the other occupants; that after they reached the incline leading up to the track, the speed was reduced to six to nine miles an hour; that they listened and heard no signal from the car; that nothing obstructed the view of the car on the railroad track but the trees; the telegraph poles and the house and that after passing the trees there was nothing but the telegraph poles. There was the usual controversy as to whether or not those in charge of appellant's car gave signals in approaching the crossing. ~~Appellee~~ plaintiff and those in the motor car with him, testified that no such signals were given, while on the part of ~~appellant~~ defendant George Hesler, who lived in the house referred to, as being east of the highway at that point testified he was in his front yard and heard the danger signal given; that ~~appellant's~~ defendants car was then half way between the house and the crossing and it kept signaling until it struck the automobile. Three other persons, who were at the Hesler house, another witness living some two blocks from the crossing, a passenger on the car, the conductor and the motorman all testified positively that the danger signal was given

by the car in approaching the crossing. The greater opportunity of the witnesses for appellant to hear the signal and the fact that six of them had no interest in the case, cannot be ignored and it must be concluded that a preponderance of the evidence showed that the danger signals were given as appellant's car approached the crossing. Appellee and his companions testified to have commenced looking for cars on the track, 300 feet from the crossing and continued to do so until the automobile was struck, yet it does not appear from these witnesses that the obstructions were such as to prevent them from seeing a car for the whole of that distance. One witness on the car stated he saw the automobile 75 feet from the track and another that he saw it when it was 200 feet from the track and if this were so, those in the automobile should, if they looked, have seen the approaching trolly car as the track was elevated a number of feet higher than the highway.

It is not contradicted and the exhibits in evidence show that there was no obstruction when the automobile was within 32 feet of the track except the five telegraph poles 100 feet apart between the crossing and the house and the evidence shows that they did not obstruct the view until the automobile was in line with the poles. The proof for appellees was to the effect that the car was 100 to 150 feet away when the automobile was six or seven feet away from the crossing and that the car struck the front wheels of the automobile. If, as testified to by appellee and those with him, the automobile was going at the rate of six to nine miles

an hour, there was ample time for the one in charge of it when it reached a point 32 feet from the crossing to look, listen and discover the approaching car, as it must then have been easily discernible, and if, as stated by appellee, the automobile could have been stopped within 18 feet the accident could thus have been avoided. The failure of the one operating the automobile to stop it in time to avoid the accident, must, under the circumstances, be held to charge him with a lack of ordinary care for his own safety and that of appellee and the others with him. Appellant was running its car through the country outside of the city limits on its own right of way, and the proof does not show that, considering the surroundings, it was being run at an unreasonable rate of speed or without regard to the safety of those on the highway, who were in the exercise of care for their own protection.

On the whole the verdict appears to us to have been against the manifest weight of the evidence and the judgment of the court below will be reversed and the cause remanded.

Reversed and remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 24 *day of April A. D. 1916.*

Clerk of the Appellate Court.

OPINION

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199 A 8

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the Seventeenth *day of April A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

199 I.A. 8

Jos. A. Kurrus Livery and Undertaking Company,
Appellant.

vs.

No. 22.

October Term, 1915

Fannie Crossett,
Appellee.

~~ERROR TO~~
APPEAL FROM

City COURT

East St. Louis ~~COUNTY~~

TRIAL JUDGE

HON. ROBERT H. FLANNIGAN.

Term No. 22. October Term, 1915. Agenda No. 10.

Joseph A. Kurrus, Livery and Undertaking Company, Appellant.	Appeal from City Court of East St. Louis.
v.	
Fannie Crossett, Appellee.	

Opinion by Higbee, P. J.

This, a suit in assumpsit, was brought by appellant, a partnership engaged in the undertaking business, against appellee and Ollie Hednour, now Ollie Fagan, to recover a balance of $213 claimed to be due on the funeral expenses of L. J. Hednour, the father of Ollie. At a former trial the jury found in favor of the defendant and on the next trial the case was dismissed as to Ollie Fagan and the trial had against Fannie Crossett alone. This trial also resulted in the jury finding against appellant and a motion for a new trial, having been overruled, judgment was entered against it for costs, from which it has appealed to this Court.

The only question presented for our consideration is, was the verdict so manifestly against the weight of the evidence that the judgment should be reversed on that account.

Appellant sought to recover upon a contract claimed to have been made with it by appellee, to pay said funeral expenses. There were but four witnesses sworn on the trial concerning the claimed making of the contract. It appears from their testimony that I. N. Hednour died in a public hospital in East St. Louis on July 27, 1912; that he left a widow Mary Hednour and several children, among them a daughter by a former wife, Ollie Hednour, who worked for and made her home with appellee. After the death of Mr. Hednour, a nurse at the hospital telephoned to appellant to come and take charge of the body which was done and after the body was prepared for burial, it was taken to the house of appellee. Frank J. Furrus, a member of the firm who attended to the matter, testified that appellee, the widow Mary Hednour, and a daughter Ollie Fagan, were present at the undertaking parlors when the body was there and that after matters pertaining to the funeral were discussed, he asked of them who was to pay the bill and that appellee agreed to pay the same. Appellant introduced in evidence an account charged upon its books, showing the expenses for the funeral, amounting to $248, were charged to appellee and Ollie Hednour, and the latter had paid $35 on the same. Ollie (Hednour) Fagan testified that appellee promised at that time to pay the bill, while Mary Hednour stated the agreement was that appellee would pay it if the daughter Ollie did not. It was shown on the trial that appellant was called to the hospital at appellee's suggestion; that afterwards the widow and children received $700 life insurance and that ap-

pellant attempted, without success, to collect the bill from them out of this insurance. Appellee denied that she agreed to pay the bill or that she ordered the nurse to call appellant, but that when asked by the family who should be sent for she suggested appellant.

Two juries have passed on appellant's claim and both have rejected it. It is true that Frank N. Murrus is corroborated by the daughter Ollie and to a certain extent by the widow Mary Nednour, who stated, however, that the promise to pay was on condition that the daughter did not pay the account. While Murrus states he did not hold the daughter liable, yet he attempted to collect it from her, charging it to her jointly with appellee and originally made her a party defendant to the suit. It also appeared from the proofs that the widow was not on friendly terms with appellee and that there was a controversy between them at the undertakers, as to where the body should be taken. It was also shown that unfriendly relations existed between the daughter and appellee and that subsequent to the funeral there had been a law suit between them. While it is true that the greater number of witnesses testified in favor of appellant that did not necessarily determine its right to recover. The fact that these witnesses did not clearly agree as to the contract, that they were unfriendly towards appellee and that appellant had done things which might be taken as inconsistent with the contention that appellee alone contracted to pay the funeral expenses, were no doubt all considered by the jury in arriving at a verdict. It appears to

the court that this is a case where the well established rule should be applied that the jury, under proper instructions, should be the judges of the weight and credence to be given to the testimony of the witnesses, as they see them on the stand and hear them testify.

There is no suggestion of error committed by the court on the trial and the evidence on the part of defendant was sufficient to support the verdict. The jury on this trial as on the former one, saw fit to give credit to the testimony of appellee rather than that produced for appellant and under these circumstances this court does not feel justified in reversing the judgment of the court below.

Judgment affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 24th *day of April A. D. 1916.*

Clerk of the Appellate Court.

OPINION

Fee $ .....

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the ----17th---- *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Fred J. Koch,

Appellee.

vs.

No. 34.

October Term, 1915

Sue B. Louden and Mildred Louden,
Executrices of the Estate of
Walter S. Louden,

Appellants.

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Clinton COUNTY

TRIAL JUDGE

HON. JAMES C. MC BRIDE.

Term No. 34. October Term, 1915. Agenda No.68.

Fred J. Koch, Appellee v. Sue M. Louden and Mildred Louden, Executrices, etc. Appellants.	Appeal from Clinton.

Opinion by Higbee, P. J.

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This suit arose on the following claim filed in the county court of Clinton County, Illinois, December 29, 1914:

"Estate of Walter J. Louden, deceased to Fred J. Koch, debtor.

To loan of $1500 for which 15 shares of preferred stock and 15 shares of common stock of L. & C. Milk Company were given as security----------$1500.00

To interest on above from July 1, 1913 to date at six per cent ----------61.25

Total ----------$1561.25

After the claim was filed in the county court it was, by stipulation ~~of the parties~~, transferred to the circuit court ~~of said county~~ where it was tried ~~at the January term, 1915~~ before the court without a jury, ~~the trial~~ resulting in a finding and judgment in favor of the claimant for the

Term No. [illegible] [illegible]

[illegible]

Appellee

v.

[illegible] L. Loudon and Mildred Loudon,

Appellees, etc.

Appellants.

Appeal from Clinton.

Opinion by Hughes, J. [illegible].

This suit arose on the following claim filed in the county court of Clinton county, Illinois, [illegible], [illegible]:

"Estate of Milton L. Loudon, deceased to [illegible] L. Loudon, Dr.

To loan at Bank Durand, Ill. absence of [illegible] and Ill. money or common stock of [illegible]. Bill therefor [illegible] given as security----------

To interest on same from July 1, 1912 to date [illegible] at six per cent ----------

Total ----------

After the claim was filed in the county court it [illegible], by stipulation [illegible], [illegible] court [illegible] it was [illegible] [illegible] before the county court without a jury, [illegible] [illegible] in a finding and judgment in favor [illegible] [illegible]

full amount of the claim.

The proofs showed that in 1910 Walter H.Louden was president and manager of a corporation known as the W.& O. Milk Company, the principal place of business of which was at Waterloo, Illinois, and was also engaged in selling the stock of the company. In ~~the latter part of~~ December of that year, he sold ~~appellee~~ claimant fifteen shares of common stock and fifteen shares of preferred stock of the company. The stock was issued as ofthe date of July 1, 1910 but the letter transmitting the same to ~~appellee,~~ claimant was dated December 29, 1910 and contained among other things the following: "As I told you in the office yesterday, if you should find this investment not to be profitable within two years, I will purchase the stock back from you at what you paid for it, plus six per cent interest, less any dividends paid." In payment for these shares of stock ~~appellee~~ claimant sent Louden a note for $1500 due in ninety days payable to the Union Trust and Savings Bank of East St.Louis. ~~On receipt of the note~~ Louden delivered ~~it~~ the note to the bank and ~~the $1500~~ it was placed to the credit of the W. & O.Milk Company. *It is conceded by appellants that Louden was bound by the terms of this agreement until the expiration of the term of two years mentioned in his letter, but the option given appellee was not exercised by him within theperiod named and it is contended by appellants that if it extended for more than one year, it came within the statute of frauds and could not be extended, modified or changed by parol, but only by another written

full amount of the claim.

The people chosen in July which [illegible] president and manager of a copper mine known as the [illegible] Milk Company, the original stock of which [illegible] at Waterloo, Illinois, and was also engaged in selling the stock of the company. In the latter part of December of that year, in payment [illegible] fifteen shares of common stock and fifteen shares of preferred stock of the company. The stock was issued on or about the date of July 1, 1910 but the latter transaction the same to [illegible], was dated December [illegible] 1911 and contained among other things the following:

"If I told you in the office yesterday, if you should find this investment not to be profitably within two years, I will purchase the stock back from you at what you paid for it, plus six per cent interest, less any dividends paid." In payment for these shares of stock [illegible] gave Loudon a note for $3500 due in ninety days payable to the Union Trust and Savings Bank of St. Louis. [illegible] delivered it to the bank and the stock was placed to the credit of the [illegible] Milk Company. It is conceded by [illegible] that Loudon was bound by the terms of this agreement until the expiration of the term of two years mentioned in his letter, but the option given Schaffle was not exercised by him within the period named and it is contended by appellants that if it be extended for more than one year, it [illegible] within the statute of [illegible] modified by [illegible]

agreement. It is further contended by appellants that there was no evidence either oral or in writing that such agreement was so extended and that the conduct, dealings and correspondence of appellee clearly indicated that he considered himself a stock holder of the company and not a creditor of Mr. Louden. On the other hand, appellee contends that under the law the agreement could be extended by parol and that the proofs show that there was such a parol agreement of extension.

The letter ~~of Mr. Louden to appellee, above referred to~~, also stated ~~in addition to what is above set forth~~, "You will find this to be a splendid investment and I am very much pleased to have you come into the company," ~~indicating~~ that it was Louden's understanding that appellee was to become a stock holder of his company and as appellee responded to this letter by sending his note as was requested therein, it must be presumed that he also acquiesced in this interpretation of the proceedings. On July 18, 1913 some six months after the option given appellee had expired by the terms of said letter, Mr. Louden wrote to appellee, "Your money is well invested in this stock and we will dispose of it in a way that everybody will get full return. I will stay on the job and give my undivided attention to it until every stock holder is paid out of our earnings and they will have the common stock free. Your dividend check due July first will be mailed to you on the 15th of this month. The company is doing fine and making good money but the only reason that

I wanted to dispose of it was to be relieved of the big responsibility and give me an an opportunity to do more with my law business, where I could be more independent." As appellee claims interest only from July 1, 1913 it must be concluded that dividends were paid up to and including that date.

Two witnesses who claimed to have bought stock on similar terms were sworn in behalf of ~~appellee~~ claimant. One of them, A.B.Michaels, testified that he had a conversation with Mr. Louden at the Illmo Hotel in East St.Louis, at which time Mr. Louden referred "to my stock and also Mr.Koch's. He said that he would take care of us in a very short time; that he would pay that stock Mr. Koch holds and myself". He also testified that on another occasion prior to that time he had spoken to Mr. Louden about his stock and he said "Don't be uneasy I will take care of both of you as soon as I can;" that he referred to the stock held by witness and Mr. Koch. James Gray, another witness, testified for ~~appellee~~ claimant that Mr. Louden told him in speaking of Mr.Michaels and Mr. Koch that "He would take care of them as he took care of me and he was going to take care of me and he was not going to lose by it." He said that he had about the same conversation with Mr. Louden at different times and that the last conversation was a month or six weeks prior to his death but just what that date was did not appear. It appeared ~~from~~ appellants' proofs that ~~appellee~~ claimant was elected a director of the company in ~~the month of~~ January, 1914 and served on the

I wanted to dispose of it was to be relieved of my responsibility and live as an ordinary citizen to do as with my law business, where I could be more independent. As specific claims interest only from July 1, 1915 it must be concluded that dividends were paid up to and including June date.

(4) Two witnesses who claim to have bought stock on similar terms were sworn in behalf of defendants, one of them, A.J.Hickmott, testified that he had a conversation with Mr. Louden on the first Monday evening, [illegible] time Mr. Louden referred to my stock and also Mr.Koch's. He said that he would take care of us in every event that he would say that stock Mr. Koch holds and myself. He also testified that on another occasion prior to that time he had spoken to Mr. Louden about his stock and he said "don't be uneasy I will take care of both of you as soon as I can; that he referred to the stock held by witness and Mr. Koch. [illegible] that Mr. Louden told him in speaking of Br-Canada and Mr. Koch that "he would take care of them as he took care of me and he was going to take care of me and he was not going to lose my it." He said that he had about the same conversation with Mr. Louden at different times and that the last conversation was a month or six weeks prior to his death but just when that date was he did not remember. It appeared from cross-examination that witness had purchased a director's in the company in [illegible] January, July and August on the

reorganization committee of the company; that the company was reorganized on figures prepared by the committee; that ~~appellee~~ claimant took an active part in the reorganization of the company, and ~~that appellee~~ signed a paper for a stock holders meeting and an agreement for reorganization, and that it was reorganized in accordance with such written agreement. On January 31, 1914 ~~appellee~~ claimant wrote to Mr. Louden, ~~"received your telegram late last night; have important matters for to-day and find it impossible to attend your~~ unavoidably absent a meeting, ~~A few days notice would have allowed me to arrange for your meeting.... I hope you will have a successful meeting and~~ and added, "Should opportunity present itself to dispose of my stock, I wish you would accomodate me, ~~for the bank holding that paper is a little~~ uneasy and have already sometime ago, called the loan on me; but I induced them to carry me along, how long that will last I cannot say so I hope you can favor me in that way."

Even if Louden's promise to repurchase stock could be extended by parol, we find there is no proof that there was any promise made by him either by parol or other wise, which would be binding in law upon him. The only declaration made by him, which in any way tended to show an extension of the promise on the part of Mr.Louden, was the statement made to the witness Michaels, "that he would pay that stock Mr. Koch holds and myself." That statement, however, in the light of all the other evidence, does not indicate a direct promise on the part of Mr. Louden to purchase appellee's stock. In his letter of July 13, 1913 above referred, to, Mr.Louden had written to appellee "Your money is well invested in this

reorganization committee of the company; but the meeting was reorganized on figures prepared by the committee; this committee took an active part in the reorganization of the company, and specifically signed a paper for a stock holders meeting and an agreement for reorganization and that it was reorganized in accordance with such written agreement. [illegible]

January 21, 1914 [illegible] by Jones. [illegible]

[illegible] last night; most important matter for [illegible] and firmly to attend your meeting. [illegible] [illegible] meeting for [illegible]....

I have personally [illegible] meeting and should [illegible] unity present itself to dispose of my stock, I [illegible] [illegible] money and have already accepted you, called the loan on [illegible] but I induced them to carry me along, for long time will last I cannot say so I hope you can leave me in that way.

Even if Jones's [illegible] to apportion stock could be arranged by [illegible], we find there is no [illegible] any promise made by [illegible] either by [illegible] which would be binding in law upon him. The only decision [illegible] made by him, which in my way tended to show an intention of the promise on the part of Jones, was the [illegible] made by the [illegible] "[illegible] look [illegible] and [illegible]." This statement, however, in the light of all the other evidence, does not indicate a direct promise on the part of Jones. Jones to [illegible] "[illegible]" in his letter of July 1, [illegible] [illegible] had written to [illegible] [illegible] in the

stock and we will dispose of it in a way that everybody will get full returns." Subsequently we find appellee acting as a director and assisting in the reorganization of the company, and later he writes to Louden asking him to dispose of his stock if he finds an opportunity to do so. These acts on the part of appellee were not consistent with the position now taken by him that Louden had extended his promise to buy the stock and that such promise was being relied upon by him. The testimony of the witness Gray, that Mr. Louden said he was going to take care of Mr. Koch and Mr. Michaels the same as he took care of him, did not constitute a promise to extend the time for the purchase of the stock of appellee and besides there is no proof that the witness Gray had any authority to act for appellee or receive such a promise for him, and the trial court properly so held in one of the propositions submitted by appellant. In the absence of such proof, even if a promise to extend the time to appellee had been made to Gray, it would not be binding upon Louden. Louden as president and manager of the company was, judging from his correspondence, trying to make the business profitable and to protect the stock holders in their investment. Whether the investment was profitable or not and what was or is the value of the stock, is not disclosed by the proofs nor do these facts seem to us to be material in solving the question presented.

In our opinion the proofs in this case were not in law sufficient to sustain the finding and judgment of the court below and the judgment will therefore be reversed and the cause remanded.

Reversed and remanded.

Not to be reported in full.

McBride J. took no part in this hearing.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 17th *day of April A. D. 1916.*

C. C. Johnson

Clerk of the Appellate Court.

OPINION

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199 A 13

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the Seventeenth *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

In the matter of the Estate of

Martha Janett,

Appellant.

vs.

No. 37.

October Term, 1915

John Janett, et al.,

Appellees.

199 I.A. 13

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Fayette COUNTY

TRIAL JUDGE

HON. J. C. MC BRIDE.

Term No. 37. October Term, 1915. Agenda No.19.

IN THE MATTER OF THE ESTATE OF MARTHA JANETT, DECEASED.	)	
Petition of George A.A.Dieckmann, executor, for authority to carry out the provisions of the will, in reference to the burial of the deceased.	)	Appeal from Fayette.

Opinion by Higbee, P.J.

---o---

Martha Janett, a former resident of Vandalia, Fayette county, Illinois, died while visiting at her childhood home in Switzerland, on or about April 11, 1910. She left no child or children or descendants of a child or children, but left a husband John Janett, to whom she had been married some two years, and who was with her in Switzerland at the time of her death. He caused her remains to be buried in the churchyard at Fideris Graubenden, Switzerland, her native town, and returned to Vandalia, where a will was found, dated December 15, 1909, which was duly admitted to probate in the county court of Fayette county, on August 8, 1910. The will was contested but was sustained in the circuit court and on appeal the supreme court affirmed the decree of the circuit court, in an opinion filed October 16, 1914, in the case of Kemn v. Meyer, reported in 264 Ill.560. An antenuptial agreement had been entered into between Martha Janett, who was then a widow and John Janett, by which it was provided that in case he survived her, he was to have the sum of $1000 in full of all interest in her estate. By her

Term No. 27. October Term, 1918. Appeal No. 10.

IN THE [illegible] OF THE STATE OF [illegible] [illegible] Petition of [illegible] Jackson, executor, for authority to convey and the provisions of the will, in reference to the burial of the testatrix.	Appeal from Jackson.

Opinion by Hughes, J.:

Sarah Jewett, a former resident of Vandalia, Fayette county, Illinois, died while visiting at her childhood home in Switzerland, on or about April 11, 1917. She left no child or children or descendants of a child or children, but left a husband John Jewett, to whom she had been married some two years, and who was with her in Switzerland at the time of her death. He caused her remains to be buried in the churchyard at Ideria, Switzerland, where a will her relative came, and returned to Vandalia, where a will was found, dated December 15, 1916, which was duly admitted to probate in the county court of Fayette county, on August 6, 1920. The will was contested but was sustained in the circuit court and on appeal the supreme court affirmed the decree of the circuit court, in an opinion [illegible], 1919, in the case of Jewett v. Meyer, reported in 286 Ill. [illegible]. An antenuptial agreement had been entered into between [illegible], who was then a widow and John Jewett, by which it was provided that in case he survived her, he was to have the use of Sarah's in full of all interest in her estate. By her

last will and testament, she provided for the payment to her husband of the sum mentioned by said antenuptial contract, so that he had no further pecuniary interest in the estate. The will also contained the following as its first provision, "I direct that my earthly remains be decently buried in my lot which I own in the Catholic cemetery in South Hill Cemetery in Vandalia, Illinois, as per detailed directions given in writing to my executor, hereinafter named and as per copy hereto attached." After the will had been sustained in the supreme court the executor named therein, George A.A.Dieckmann, filed a petition in the county court of Fayette county, asking for an order authorizing him to comply with the first provision of the will of said Martha Janett, by bringing her body back from Switzerland for burial in the cemetery in Vandalia, Illinois. The county court granted the prayer of the petition, but on appeal to the circuit court, the same was denied and the petition dismissed at the cost of the estate, to be paid in due course of administration. From the order of the circuit court, an appeal has been taken to this court by the executor.

Upon an examination of the record we find that what purports to be the bill of exceptions in the case, is not signed by the judge who tried the same, but that both the date and the place where the signature should be, are left blank. The only questions which are presented for our determination, arising out of the evidence, and the only way the evidence can be preserved for the consideration of a reviewing court, is by a bill of exceptions. In the absence of a proper bill of exceptions in this case, we cannot review the evidence and it must be presumed that the finding and judgment of the court based thereon were correct.

last will and testament, she revoked her husband's
her husband of his son mentioned in said testament;
contrary, so that is had no further necessary interest in
the estate. He will also contained the following as its
first clause, "I desire that my entirely remains be in-
tarly buried in my lot which I own in the Catholic cem-
tary in Mount Hill Cemetery in Vandalia, Illinois, as my
detailed directions given in writing to my executor, here-
inafter named and as per copy herein attached." After the
will had been probated in the supreme court the executor
[illegible] in
the county court of Bayette county, asking for an order
authorizing him to comply with the last provision of the
will or said testator's desire, by bringing her body back from
Mississippi for burial in the cemetery in Vandalia, Illinois.
The county court granted the prayer of the petition, but
on appeal to the circuit court, the same was denied and
the petition dismissed at the cost of the estate, to be
paid in due course of administration. Upon the entry of
the circuit court, an appeal has been taken to this court
by the executor.

Upon an examination of the record we find no
what purports to be the bill of exceptions in the case, it
not signed by the judge who tried the case, but that both
the judge and the clerk where the signature should be, are
left blank. The only questions which are presented for
our determination, aside from the pleadings, and the
only way the evidence can be preserved for the consideration
of a reviewing court, is by a bill of exceptions. In the
absence of a proper bill of exceptions in this case, we
cannot review the evidence and it will be presumed that the

"Whatever outside of the common law record, viz. the summons and return, declaration, pleadings subsequent thereto, verdict and judgment, an appellant in a case at law desires the judgment of an appellant court upon, must be contained in the bill of exceptions or he will fail in his purpose." Bowlan v. Lawbka, 57 Ill.App.334. Where the evidence before the trial court is not preserved in the record by a bill of exceptions, the question whether the finding of the circuit court was in conformity with the evidence produced before that court, cannot be inquired into on appeal. Ferris v. Ferris, 89 Ill. 452.

For the failure to include a proper bill of exceptions in the transcript, so that the matters of fact argued by counsel could be considered, the judgment of the court below will be affirmed.

Affirmed.

Not to be reported in full.

Mr. Justice McBride took no part in considering this case.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 24th *day of April A. D. 1916.*

Clerk of the Appellate Court.

PINION

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the ----17th----- *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

199 I.A. 20

Bertha McIntire,

Appellee.

vs.

No. 46.

October Term, 1915

Tony Morris and John W. Lindsay,

Appellants.

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Franklin COUNTY

TRIAL JUDGE

HON. E. E. NEWLIN.

Term No. 46. October Term, 1915. Agenda No.40.

Bertha McIntire, Appellee	
v.	Appeal from Franklin.
Tony Morris and John W. Lindsey Appellants	

----o----

Term No. 47. October Term, 1915. Agenda No.41.

Ruth McIntire, et al Appellees	
v.	Appeal from Franklin.
Tony Morris and John W. Lindsey Appellants.	

Opinion by Higbee, P.J.

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On December 28, 1914, J. E. McIntire, while intoxicated, was shot and killed by city marshal Elmer Collins of Buckner, Illinois. Suit was brought by Bertha McIntire the wife of the deceased, under section 9 of the Dram Shop Act, against appellants and a number of other saloon keepers, to recover damages on account of her loss of means of support. At the same time, Ruth McIntire and Dean McIntire, minor children of the deceased, by Bertha McIntire, their next friend, brought a like suit against the same parties. By agreement of parties, the suits were consolidated as one suit and at the conclusion of the evidence, they were dismissed as to all the defendants except Tony Morris and John W. Lindsey. Thereafter separate ver-

dicts were returned against said defendants, one for the wife and one for the minor children, each for the sum of $1000. Motions for new trials were denied and judgments entered for said amounts against said defendants. Separate appeals appear to have been taken in the two suits by the defendants below, but as the evidence and instructions are identical the records will be reviewed by the court as one case and the opinion and judgment will be applicable to each. Appellants claim in their briefs that the court erred in not giving a peremptory instruction in their behalf, for the reason that upon the evidence in the case, there could be no recovery by the appellees and also erred in the instructions given to the jury.

The evidence in the case ~~is~~ was not contradictory in character and showed the following to have been the facts: J. E. McIntire, the deceased, had been married eleven years and his family consisted of his wife, Bertha McIntire and two small children, Ruth and Dean McIntire. He was a miner, owned a home worth $1000 subject to a $300 mortgage and was making four dollars a day when he worked. He and his family were dependent on his wages for support. About three weeks before his death he was hurt in the mine and was laid off from work. He was a candidate for checkweighman and was electioneering for the position. About a week after he was injured he began to drink very heavily and slept and ate but little. He took large quantities of liquor home with him which he consumed during the night. He took his gun to bed with him and threatened to shoot his wife or to shoot through the floor at her feet and acted in an irrational and dangerous manner. During this time he bought and drank

[illegible] were [illegible] against [illegible] defendants, [illegible] for the
wife and one for the minor children, both for the [illegible] of
[illegible]. Judgment for defendants were [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible]. Appel-
late tribunals [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
by the [illegible] [illegible], but [illegible] the evidence and [illegible]
[illegible] [illegible] identical the records [illegible] [illegible] [illegible] by the
court or one other and the opinion and judgment will be [illegible]
applicable to each. Appellant cites in their brief [illegible]
the court erred in not giving a cautionary instruction in
their behalf, for the reason that upon the evidence in the
case, there could be no recovery by the appellees and also
erred in the instructions given to the jury.

The evidence in the case is not contradictory in
character and shows the following to have been the facts:
J. A. Ferguson, the deceased, had been married eleven years
and has family consisted of his wife, twelve children and
two small children, both and Jean Ferguson. He was a miner,
owned a home worth $1,000 subject to a $[illegible] mortgage and was
making four dollars a day when he worked. He and his family
were dependent on his wages for support. About three weeks
before his death he was hurt in the mine and was laid up
from work. He was a candidate for checkweighman and was
electioneering for the position. About a week after he was
injured he began to feel very weakly and sleepy and ate
but little. He took [illegible] of liquor [illegible] [illegible]
him which he commenced drinking the night. He then lay down in
bed with his wife and it continued to snow. He went out
through the floor at her feet and came in an hour and
and dangerous manner. During this time he breathed very deep

liquor in the different saloons in Buckner, among others those of appellants. On Saturday previous to his death, which occurred the following Monday, he was arrested for disorderly conduct and locked up by city marshal Collins. Later in the day his wife came for him and took him home, his trial being set for Monday. He did not drink on Sunday and on that day called on a neighbor taking his gun with him and leaving it in the hall. He stated he was going to Benton to consult some attorney and see if he could not get satisfaction for his arrest and if not that he was going to shoot the "son of a gun"; that he had had trouble with Collins and made him "back down". On the following Monday morning at about eight o'clock he went to the saloon of appellant Morris where he bought two drinks of whisky and also a half pint bottle of liquor which he put in his pocket. At about 8:30 A. M. he went to the saloon ofappellant Lindsey, and drank three or four drinks of whisky and some beer. A little later he returned and got another drink of whisky and then started to take a train to Benton. Before leaving Buckner he called a man by the name of Bowman out of another saloon and asked him to go to his, McIntire's, house and get his revolver and said he wold get Collins or Collins would get him. He then went to Benton on the train that left at 11:30 A.M. and returned on the 3:30 P.M. train. It was shown by the proofs that he was drinking in Benton and also on his return. About five o'clock he went to the city hall where his trial was to have been had and after waiting 20 to 25 minutes, left there. A little later his wife found him in appellant Morris' saloon. He had a glass of whisky

in his hand and his revolver was lying on the counter. He had taken about half of the whisky and after her arrival he drank the balance of the glass. Before leaving the saloon he drank still another glass and then he and his wife started down the street, toward the city hall where a horse and buggy was standing. His wife got into the buggy and while she was telling McIntire to get in Collins opened a door near by. McIntire who had been carrying his revolver in his hand, saw Collins and commenced shooting. He fired six shots none of which took effect, but Collins fired at him in return and killed him. After McIntire's death a bottle was found in his pocket, which appeared to contain whisky. No provocation was shown whatever for the attack and the coroner's jury found that the marshal killed McIntire in self defense.

That appellees were deprived of their means of support by McIntire's death that he was intoxicated at and prior to the time he was killed and that such intoxication was caused in a substantial degree by liquor sold by appellants, are not questions of controversy in the case, but the question of fact necessary to be considered is whether the intoxication of McIntire was the cause of his death. It was shown that McIntire was of gentle disposition when sober but that when drinking was wild, and irrational; that for the two weeks prior to his death, with the exception of one day, he was in a drunken frenzy caused by liquor sold him by appellants and others, during which time he carried a pistol, talked irrationally and called himself a desperado; that on Saturday preceding his death he was arrested for disturbance of the peace by the city marshal;

in his hand and his revolver was lying on the counter.
He had taken about half of the whisky and after he arrived
he drank the balance of the glass. Before leaving the
saloon he drank still another glass and then he and his
wife started down the street, toward the city hall where
a horse and buggy was standing. His wife got into the
buggy and while she was holding intuitive in her in Collins
opened a door near by. Intuitive had been carrying his
revolver in his hand, as Collins and companions knew.
He fired six shots more of which took effect, but Collins
fired at him in return and killed him. After Intuitive's death
a bottle was found in his pocket, which proved to con-
tain whisky. No provocation was known whatever for the
attack and the coroner's jury found that the deceased
killed Intuitive in self defense.

That orphaned were deprived of their father and
support by Intuitive's death that he was intoxicated at and
prior to the time he was killed and that such intoxication
was caused in a substantial degree by liquor sold by ap-
pellants, are not questions of controversy in the case, but
the question of fact necessary to be considered is whether
the intoxication of Intuitive was the cause of his death.
It was shown that Intuitive was of gentle disposition when
sober but took to drink drinking was wild, and insane and
that for the week prior to his death, he was con-
siderably under the influence of liquor. He was
liquor sold him by appellants and others, during that time
he carried a pistol, rather threatening and
was generally considered dangerous when
was provoked and disturbances of the peace by him were frequent;

that by ten o'clock on the morning of the day of his death he had drank seven or eight drinks of whisky and some beer at appellants' places of business and purchased and put in his pocket a half pint of whisky and that he then asked a man to go and get his revolver; that just before his death while standing at the bar of appellant, Morris, in a drunken condition with his revolver lying on the counter and his wife trying to get him home, he drank two more glasses of whisky; that he shot six times at the marshal before the latter fired on and killed him.

~~Appellant~~ Defendant insists that as it was shown that McIntire was not drinking Sunday and that he stated on that day that if he did not get satisfaction he would kill Collins; that this shows his malicious intent and disproves the theory that his intoxication at the time, caused him to attempt to kill Collins. His wife, however, stated that she could control him when sober, that when in that condition he did not carry his revolver and that he only talked about Collins to her when intoxicated. At the time of his death, he was crazed with drink upon a public street with a revolver in his hand, which he had before that left at home and did not get until he became drunk.

From all the facts above mentioned we think the jury were fully warranted in finding that McIntire would not have attacked the marshal at the time and in the manner in which he did and thus bring on the altercation which caused his death, if he had not been intoxicated. The defense that McIntire came to his death through the criminal act of another is not applicable as it was shown here, and was found by the coroner's jury that the city marshal killed McIntire in self defense. In Jack v. Prosperity Globe,

that by ten o'clock on the morning of the day of his death he had drunk seven or eight drinks of whisky and beer at appellants' places of business and procured and put in his pocket a half pint of whisky and that he then sent a man to go and get his revolver; that just before his death while standing at the bar of appellants, in a drunken condition with his revolver lying on the counter and his wife trying to get him home, he drank two more glasses of whisky; that he shot six times at the [illegible] before the latter fired on and killed him.

Appellant insists that as it was shown that Sinclair was not drinking Sunday and that he stated on that day that if he did not get satisfaction he would kill [illegible] and this [illegible] the theory that his intoxication at the time, caused him to [illegible]. The wife, however, testifies that she could control him when sober, that when in that condition he did not carry his revolver and that he only [illegible] about [illegible] when intoxicated. At the time of his death, he was armed with [illegible] a revolver in his hand, which he had [illegible] at home and did not get until he became drunk.

From all the facts above mentioned we think the jury were fully warranted in finding that appellants could not [illegible] the [illegible] and at the time in which he did [illegible] the intoxication which caused his death, it is [illegible]. [illegible] through the [illegible] is not [illegible] by the [illegible].

147 Ill.App.176, this court held, that in order to recover under the dram shop act for loss of support caused by the death of the father of the plaintiff, the intoxication need not be shown to be the immediate, direct or proximate cause of the death, it is sufficient if it be the cause and this doctrine was adhered to in Whiteside v. O'Connors 162 Ill.App.108, it being stated in the latter case "We conclude that if the husband of plaintiff in error committed suicide while in a state of intoxication and that the defendants in error contributed in whole or in part to produce such intoxication, the rule announced in Jack v. Globe, supra, is applicable and that it was only incumbent upon plaintiff in error to show that the intoxication of her husband was the cause of his suicide either proximate or remote." The same rule would appear to us to apply in this case where the firing by McIntire upon the marshal, which compelled the latter to kill him in self defense, was in effect the same as though McIntire had killed himself.

The facts in this case warranted a finding by the jury that the death of McIntire was caused by his intoxication and that such intoxication was caused in whole or in part by liquor sold him by appellants.

Complaint is made by appellants of the following instruction given for appellees: "The jury are instructed, as a matter of law, that if you find from a preponderance of the evidence that the defendants, or either or any of them, sold or gave intoxicating liquors to J. H. McIntire, which caused him to be and become intoxicated to such an extent and degree that he became insane and irrational in his mind, and that whilst so intoxicated, attempted to shoot

147 111.Am.176, this court said, that in order to recover under the dram shop act an injured caused by the death of the father of the plaintiff, the intoxication need not be shown to be the immediate, direct or proximate cause of the death. It is sufficient if it be the cause and this doctrine was followed in Gulstadie v. O'Donnell 182 Ill.App.168, in doing stated in the latter case "We conclude that if the husband is actually in error concerning the cause of his suicide or intoxication and that the defendants in error contributed in whole or in part to produce such intoxication, the rule announced in Dick v. Dunn, supra, is applicable and that it was only necessary upon plaintiff in error to show that the intoxication of her husband was the cause of his suicide either directly or remotely. The same rule would appear to be applied in this case where the giving by Kelkline upon the mother, which constituted the latter to kill him in self defense, was in effect the cause in a much literal sense himself.

The Court in this case warranted a finding by the jury that the death of Lecrifire was caused by his intoxication and that such intoxication was caused in whole or in part by liquor sold him by appellants.

Complaint is made by appellants of the refusing instruction given for appellee. The jury are instructed, as a matter of law, that if you find from a preponderance of the evidence that the defendants, or either or any of them, sold or gave intoxicating liquors to H. . . . , which caused or contributed to be the cause of his death, and that such intoxication caused him to commit suicide, and that the act of suicide was caused in whole or in part by the intoxication, and that such act of suicide was the cause of the death of the husband of the plaintiff, then the defendants are liable.

and kill another person, who was then and there an officer of the law, and that such officer of the law in his own necessary self-defense, and not from any spirit of revenge, or any other unlawful cause, was compelled, in order to save his own life, to shoot and kill the said J. M. McIntire and that plaintiffs were then and there injured and damaged in their means of support, then you should find for the plaintiffs and assess their damages at such sum as you may believe they are entitled to under all the evidence, facts and circumstances proven in this case." The criticism of this instruction is that it did not require that the intoxication should have been the cause of McIntire's attempt to shoot the other person; that the terms under which, according to this instruction the appellants could be found guilty, were that appellant did the act while he was intoxicated regardless of whether or not the intoxication was the cause of it. Appellants also complain of another instruction given for appellee, which contains substantially the same theory as the one above referred to, except that it tells the jury if they believe from the evidence that said J.M. McIntire was intoxicated to such a degree that his mind for the time being was unbalanced and that he was of unsound mind and that while in that condition, so produced by such intoxication, he unlawfully assaulted another person with a deadly weapon in such a manner as to make it necessary for the person assaulted to shoot and kill him, they might find that the intoxication was the cause of his death. It is said that this instruction also fails to require that the intoxication should be the cause of his assaulting the other person. The whole case was tried upon the theory that in order to entitle the plaintiff to recover it must appear that

the intoxication caused McIntire to assault the marshal and thereby caused his death.

The first instruction given for appellees told the jury that to entitle them to recover, McIntire's death must have been brought about or caused by the intoxication, and other instructions given for them followed the same theory. The instructions given for appellees must be considered as a whole and when they are all considered together, they plainly inform the jury that in order to entitle appellants to recover, it must appear that the intoxication of McIntire caused the act which led to his death. Complaint is also made of an instruction asked by appellants which was refused by the court. This instruction was somewhat involved and to some extent misleading, and the refusal to give it does not appear to us to involve such error, as to necessitate a reversal of the judgment in this cause, which is sustained by the proofs and where substantial justice appears to have been done.

Judgment affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 19th *day of April A. D. 1916.*

Clerk of the Appellate Court.

PINION

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the Seventeenth *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Town of Canteen,
Appellant.

vs.

No. 51.

October Term, 1915

Fred Weber & Martha Weber,
Appellees.

ERROR TO
APPEAL FROM

City COURT

East St.Louis COUNTY

TRIAL JUDGE

HON. W. J. VANDEVENTER.

Term No.51. October Term, 1915. Agenda No.49.

Town of Canteen, Appellant. v. Fred Weber and Martha Weber, Appellees.	Appeal from City Court of East St. Louis.

Opinion by Higbee, P. J.

This suit to recover a penalty under the statute, for an obstruction of a highway was originally brought upon the complaint of one of the highway commissioners of appellant, against appellees before a justice of the peace. Upon appeal to the city court of East St. Louis, where there was a trial de novo, a verdict of not guilty was returned in favor of appellees and judgment was entered against appellant for costs. The case was brought to this court by appellant and on review of the record, we held that the verdict was manifestly against the weight of the evidence and that judgment was improperly entered against appellant for costs, as the suit was one for a penalty. That judgment was therefore reversed and the cause remanded for a new trial. On the second trial the jury again found for appellees and judgment was entered on the verdict against the town of Canteen in bar of the action. To review this judg-

ment the town has again appealed to this court. The complaint was that appellees were unlawfully obstructing and encroaching upon one of the highways of the town of Canteen, known as Cookson Road; that said obstruction consisted of a fence erected and maintained thereon by appellees on the westerly end of said highway near its intersection with the Collinsville road; that said Fred Weber had been notified in writing to remove said obstruction but had failed and neglected to do so. It appeared from the proofs that both appellees were notified verbally to remove this fence and that they both agreed they would remove the same if the commissioners would allow them about ten days time to purchase an adjoining piece of ground.

The main question of fact to be decided at the former trial was whether the premises included in appellee's fence and which were about 30 feet wide and extended some 200 to 300 feet along the highway, had been used as a public road for the period of fifteen years and on that question this court was of the opinion that the manifest weight of the evidence was that the premises had been so used for such a length of time. On that point there appears to have been no substantial difference or variation between the evidence on the first and second trials. The proofs as to the facts having been substantially the same on the two trials, we find no reason why we should depart from the conclusion which we reached when the case was here the first time and we therefore are compelled to hold this time, as formerly,

that the verdict of the jury was manifestly against the weight of the evidence. On the second trial, however, a new theory of defense was introduced by appellees, in accordance with which objection was made by them to the redocketing of the cause, for the reason that since the former trial in the city court, the territory including the road in qustion had become incorporated in and a part of the village of Fairmount, or Fairmount City as the village seems to be indiscriminately called in the suit. A verified plea was filed by defendants setting forth said new facts and alleging that they constituted a bar to plaintiff's action. It was the claim of appellee on the trial, that as soon as the territory in question was incorporated in the village, appellant lost its authority over the same and therefore the right to maintain an action for the penalty abated. The statute under which this action was brought, provides for a penalty of not less than three nor more than ten dollars upon conviction of said offense, and that such penalty when collected shall be paid over to the treasurer of the commissioners of the town to be used on roads and bridges in the town. (Rev. Stat.Chap.121).

In the case of Hatridge v. Snyder 78 Ill.519, it was held that a proceeding to collect such a penalty is an action of debt or assumpsit to recover a penalty and is not a criminal action nor a case of a criminal nature. As the town was entitled to the penalty as soon as the act which warranted its recovery was committed and had a right to bring a civil action to recover the same,we are unable to accede to the claim that the right to the penalty was lost by rea-

that the verdict of the jury was manifestly against the weight of the evidence. In the second trial, however, a new theory of defense was introduced by [illegible], in accordance with the which objection was made by them to the admission of the [illegible], upon the ground that [illegible] further trial in the city court, the [illegible] involving the road in question had been [illegible] and a part of the village of [illegible], or [illegible] the village seems to be [illegible] in fully [illegible] to the [illegible]. A verdict was [illegible] by [illegible] motion [illegible] and new [illegible] and [illegible] substituted a [illegible] to plaintiff's motion. [illegible] claim of [illegible] on the trial, that [illegible] in question was [illegible] corporated in the [illegible], [illegible] lost its authority over the [illegible] and therefore the right to maintain an action for the [illegible] city [illegible]. [illegible] motion was brought, provides for a penalty [illegible] than [illegible] [illegible] [illegible], and that such penalty [illegible] collected. [illegible] to the [illegible] of the commissioners of the town to be used in [illegible] and bridges in the town. (Lev. Test. Town. 191).

In the case of [illegible] v. [illegible] v. [illegible], it was held that a [illegible] to enforce such a penalty in an action of debt [illegible] the penalty was not a certain [illegible] [illegible] contract. [illegible] the town was entitled to a penalty [illegible] [illegible] a civil action [illegible] we are unable to accede to the claim that the right to the penalty is lost by con-

son of the separation of that portion of the road where the offense was committed from the town, subsequent to the commission of such offense. In fact the village of Fairmount was incorporated as shown by the proofs in May, 1914, which was long after this suit was commenced and after it had come by appeal to this court. At the time the suit was commenced the rights of the parties were fixed and their status settled and if the town was then entitled to recover from appellees, the penalty for the obstruction of the road in question, that right has not been lost because the territory where the obstruction was placed has since been included in the village. The court, over the objection of appellant, permitted appellees to make proof that the part of the road they were charged with obstructing is now within the corporate limits of the village of Fairmount, by parol testimony. This proof, whether made by parol testimony or otherwise was incompetent and the court erred in admitting it. - For the same reason the court should have excluded the testimony of witnesses as to the location of Fairmount and its boundaries and as to the premises in question being within the limits of the village, counsel for appellant having moved to exclude the same.

For the reasons above stated the judgment of the court below will be reversed and the cause remanded.

Reversed and remanded.

Not to be reported in full.

son of the separation of that portion of the road where the offense was committed from the town, subsequent to the commission of such offense. In fact the village of Fairmount was incorporated as shown by the records in 1914, which was long after this suit was commenced and after it had come by appeal to this court. At the time the suit was commenced the rights of the parties were fixed and their status settled and if the town was then entitled to recover from appellees, the penalty for the obstruction of the road in question, that right has not been lost because the territory where the obstruction was placed has since been included in the village. The court, over the objection of appellant, permitted appellees to make proof that the part of the road they were charged with obstructing is now within the corporate limits of the village of Fairmount, by parol testimony. This proof, whether made by parol testimony or otherwise was incompetent and the court erred in admitting it. For the same reason the court should have excluded the testimony of witnesses as to the location of Fairmount and its boundaries and as to the premises in question being within the limits of the village, [illegible]

For the reasons above stated the judgment of the court below will be reversed and the cause remanded.

[illegible]

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 25th *day of April A. D. 1916.*

Clerk of the Appellate Court.

OPINION

199 A 25

1570

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the Seventeenth *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

199 I.A. 25

Village of Carrier Mills,
Illinois,
Appellant.

vs.

No. 55.

October Term, 1915

Lou Pritchard,
Appellee.

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Saline COUNTY

TRIAL JUDGE

HON. A. W. LEWIS.

Term No. 55. October Term, 1918. Agenda No.43.

Village of Carrier Mills, Illinois, Appellant.	)	
v.	)	Appeal from Saline.
Lou Pritchard, Appellee.	)	

Opinion by Higbee, P. J.

Appellee fell from a plank used as a crossing over a ditch in one of appellant's streets, and brought suit for the injuries sustained by the fall, alleging in her declaration that appellant was negligent in failing to keep and maintain the plank crossing in a reasonably safe condition; that the public was compelled to use the crossing and that appellee was injured while in the exercise of due care for her own safety. The verdict and judgment were in favor of appellee for $500. Appellant asks a reversal of the judgment of the trial court, alleging that the evidence failed to show due care on the part of appellee in attempting to cross the ditch on the plank and also that on the question of due care on her part, the jury were improperly instructed by the court.

The ~~facts and circumstances leading up to the injury were shown by the proofs to be as follows~~ evidence tend Oak street, 32 feet wide, runs east and west through the business part of the village of Carrier Mills and two blocks east of the

business portion of the village is intersected by a 30 foot street running north and south which has no name. Along the west side of the unnamed street where it crosses Oak street, is an open ditch 11 feet wide and across this ditch in the center of Oak street, is a bridge 16 feet in length from north to south. North of this bridge some six to eight feet, a plank had been placed across the ditch, at the suggestion or order of the village board. Where the plank was placed the ditch was some three feet deep and eleven feet wide from bank to bank, and the plank was 16 feet long 2 inches thick and 8 inches wide.* It appeared that there was no sidewalk on the south side of Oak street leading up to the unnamed street, but there was a sidewalk on that side of Oak street a block or more distant towards the east and that those living or traveling along that side would cross over to the north side, where t there was a sidewalk leading up to the 30 foot street and then cross back to the south side. In this manner nearly all the foot travel along Oak street was diverted to the north side at that point and the board was generally used by those walking back and forth at that place in crossing the ditch. The sidewalk on the north side coming from the business portion of the town was 4 feet wide and stopped at the east side of the unnamed street and commenced again on the west side of said street, continuing towards the west. It was about 6 feet from the east end of the sidewalk to the plank and about the same to the bridge, there being but little difference in the two distances. The ground was perfectly level from the sidewalk to the plank, while there was a ditch two feet wide and 12 to 18 inches deep to be

crossed, in reaching the bridge. There was a path from the side walk to the bridge along which some cinders had been placed and in fair weather the path and the bridge were used by foot passengers to cross over but in muddy weather the plank was generally used for that purpose. This plank had been at the place in question for seven or eight months and was used by ~~appellee~~ plaintiff in going from her home to her husband's place of business and in returning. It was shown to have been unsafe. ~~Appellee~~ Plaintiff testified she went back and forth once or twice a week over the crossing and when she went upon the board, it was springy and wobbly. Her husband testified it was slanting and tilty; that it sprang down when walked upon; that there was a little tilt to the side and a fellow sometimes had to jump. On the third of January, 1913, at about one o'clock in the afternoon, ~~appellee~~ plaintiff, a woman forty-five years of age, weighing 165 to 170 pounds, was returning to her home from the business part of the village, carrying three bundles. When she reached the crossing the ground which had been frozen early in the day but had then thawed out on the surface, was quite muddy and sloppy. Her feet were also muddy and as she attempted to cross over the plank with her bundles, she slipped off and received the injuries complained of.

The evidence clearly showed that the crossing over the plank was unsafe and insecure and that its dangerous condition was known to appellee; also that by a very little extra effort she could have crossed over the bridge and thereby adopted a way which was shown to be safe. While it is evidence from the proofs that the village authorities

were negligent in permitting the plank in its unsafe condition to be used by the public to cross the ditch, that does not excuse one from the effect of his own negligence in using the same knowing it to be unsafe, when a safe and substantially as convenient a means of crossing could readily have been adopted. It appears to us that a woman of the weight of appellee, carrying three bundles, was likely to fall when attempting with muddy feet to cross over a ditch 11 feet wide on an 8 inch board, which was springy, slanting and insecure and the fact that appellee did this, shows that at the time she was not exercising due care for her own safety; That she may have used due care to have avoided falling after she got upon the plank, does not excuse her lack of care and caution in going upon it at all. In our opinion the verdict of the jury was manifestly against the weight of the evidence and the judgment based thereon should not be permitted to stand.

Complaint is made by appellant that the instructions did not tell the jury that due care exercised by appellee for her own safety after getting upon the blank, was not sufficient to entitle her to a recovery but it is unnecessary to review these instructions as any fault they may have contained in that regard may be readily remedied upon another trial. The judgment will be reversed and the cause remanded.

Reversed and Remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 24th *day of April A. D. 1916.*

Clerk of the Appellate Court.

PINION

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the Seventeenth *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

William J. Weger and Nancy A. Weger,
Appellees.

vs.

No. 68.

October Term, 1915

Western Supply and Wrecking Company,
Appellant.

ERROR TO
APPEAL FROM

Circuit COURT

Crawford COUNTY

TRIAL JUDGE

HON. CHARLES H. MILLER.

Term No. 68. October Term, 1915. Agenda No.16.

William J. Weger et al, Appellees,	)	
v.	)	Appeal from Crawford.
Western Supply and Wrecking Company, Appellant.	)	

Opinion by Higbee, P. J.

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Appellees sued appellant before a justice of the peace to recover rentals on an oil and gas lease on appellees' farm, for the year 1914. The jury there found against appellees, but on appeal to the circuit court, they recovered a judgment and verdict for $15. While it is urged that the court erred in instructions and in the admission of evidence, we deem it unnecessary to turn our attention to any other than the question whether appellees were entitled to recover on the proofs in the case. There was no evidence in the case except the testimony of three witnesses introduced by appellees and the written lease, with the assignment of the same to appellant.

The evidence showed that in 1907 appellees were the owners of some thirty-five acres of land in Crawford county, Illinois, which they leased to C. E. Shaffer for the production of oil and gas. The lease among other things, provided "While the product of each well in which gas only is found, shall be marketed from said premises, the second

William J. Yager et al.,

Appellees,

v. } Appeal from Circuit Ct.

Western Supply and Trading Company,

Appellant.

Opinion by Milligan, J. P.

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Appellees sued appellant before a justice of the peace to recover rentals on an oil and gas lease on a tract of land, for the year 1914. The jury there found against appellees, but on appeal to the circuit court, they recovered a judgment and verdict for $181. While it is proved that the [illegible] was [illegible] in [illegible], we deem it unnecessary to turn our attention to any other than the question whether appellees were entitled to recover on the proofs in the case. There was no evidence in the case except the testimony of three witnesses produced by appellees and the written lease, with the assignment of the same to appellant.

The evidence showed that in 1908 [illegible] the owners of some thirty-five acres of land in Lawrence County, Illinois, which they leased to C. [illegible] for the production of oil and gas. The lease covered other things, including "all the standard of rock salt in which the only [illegible] would be required from salt producers." In second

party will pay to the first parties therefor, at the rate of $150 per annum, and give the first parties free gas at the well for domestic purposes, for dwelling house during the sametime." In 1908 the Shaffer-Smathers Oil Company having acquired the lease, drilled a well on the land in question which produced gas only. This gas was marketed and used for general consumption in Vincennes, Indiana. During this time appellees also used the gas and were paid the rental of $150 a year until January 1, 1914. On January 2, 1914 the Shaffer-Smathers Oil Company assigned the lease to appellant which assumed all obligations, arising from the operation of the property after January 1, 1914. Sometime during the year 1913 the flow of gas from said well was insufficient to supply the domestic uses of appellees when it was permitted to flow into the main for commercial purposes, and appellees, therefore, shut the gas off entirely from the commercial line and during the rest of that year and the whole of the year 1914 the gas from this well at no time went into the commercial main but was used by appellees free of cost for domestic purposes. David Maxwell owned lands adjoining the premises of appellees upon which there were a number of strong gas wells, of which appellant was also the owner, under a lease of the property for that purpose and this product was also carried to the market at Vincennes for commercial purposes. In order that the pressure from his wells might be stronger, an arrangement was made whereby Maxwell used the gas from appellees well for the year 1914 for

party will pay to the first parties thereafter, at the rate of $150 per annum, and give the first parties above, free of the oil for domestic purposes, for drilling and operating the premises." In 1906 the Indian-Indiana Oil Company acquired the lease, drilled a well on the land in question which produced gas only. This gas was marketed and used for general consumption in Vincennes, Indiana. During this time appellees also used the gas and were paid the rental of $150 a year until January 1, 1914. On January 2, 1914 the Shafter-Mahoney Oil Company acquired the lease to appellant which assumed all obligations, arising from the operation of the property after January 1, 1914. Prior to during the year 1915 the flow of gas from said well was insufficient to supply the demands over it previously, since it was insufficient to flow into the main for commercial purposes, therefore, said lease was forfeited by the Shafter-Mahoney Oil Company and during the year or two prior and subsequent to the year 1914 the gas from this well at no time went into the commercial main but was used by appellees free of cost for domestic purposes. During several years there existed the rentals of appellees upon which there were a number of strong gas wells, of which appellant was also one owner, under a lease of the property at that time and this product was also carried as the market of Vincennes for commercial purposes. In order that the reader may fully understand the facts, an examination of the Mahoney lease and the rights [illegible] the

his own domestic purposes, paying nothing therefor to any one. Appellees hold to the position that although this gas was not sold directly on the market by appellant, yet as it was taken from their well and used for the benefit of appellant, that it was really marketed within the meaning of the contract and therefore appellant is liable to pay to them the rental provided for therein.

If the original contract alone were to be relied upon there might be some merit in the contention of appellee, but it appears that when the flow of gas from the well on appellees' land became so low that it could not be used to supply appellees for domestic purposes and also furnish a supply to the mains for commercial purposes, that a new arrangement or agreement was entered into. Bert Lanahan who was foreman in charge of the wells on these premises in October, 1913, testified at the instance of appellee that when he found the gas shut off at that time, he wrote to Mr. Hollister his superior officer in regard to the matter, who wrote him in reply to let it go at that time and later on he would pull the well out because it was not worth paying another rental on, and that thereafter an arrangement was made by the witness with appellees and Maxwell, by which it was agreed that instead of abandoning the well and pulling up the pipe, the then owner of the lease would allow the same to remain as it was with appellees' well shut off from the commercial line and with the privilege to Maxwell to use

his own domestic purposes, having [illegible]
Appellees held to the contrary [illegible]
sold directly on the market by a [illegible]
from their well and used for the [illegible]
it was really marketed [illegible]
and therefore specifiant is [illegible]
provided for therein.

If the original contract alone [illegible]
upon there might be some merit in the contention of appellee,
but it appears that when the time of performance [illegible]
appellees' land became so low that it could not be used to
[illegible]
a supply to the mains for commercial purposes, that a new
arrangement or agreement was entered into. That [illegible]
who was foreman in charge of the [illegible] pumping
in October, 1919, notified the [illegible] of the fact
that he found the pump [illegible] at Mud Lake, he wrote to
Mr. Hollister the superior officer in reporting to the [illegible]
who wrote him in reply to let it go at that time and [illegible]
on he would pull the well out because it was [illegible]
paying another [illegible] on, and that [illegible]
was made by the witness [illegible] "[illegible]", by which
it was agreed that instead of abandoning the well [illegible]
up the pipe, the [illegible] of the [illegible]
made to remain as it was with appellees' [illegible]
the commercial line [illegible]

the gas therefrom with appellees consent; that from said time Maxwell and the appellees used this well and no gas has been marketed therefrom through the commercial main. It will thus be seen that appellees would have been deprived of the gas from their own well if appellant or its predecessor had "pulled the well" as contemplated, and that they were recompensed for what Maxwell used by the pipe being left in the well so that the gas could be also used by them; that appellant in consideration of leaving the well was benefitted by the fact that gas was furnished to Maxwell while all the gas from the Maxwell wells was turned into the commercial main. This arrangement appears to have been fair and to have been for the benefit of all parties. It also appears to have superseded or taken the place of the old contract when that had practically ceased to be operative, by reason of the substantial failure of gas in the well covered by it. It would seem to be manifestly unfair to permit the appellees to have the benefit of the well, which appellant and its predecessor had a right to "pull out" under the new contract or agreement entered into and at the same time recover compensation under the original lease. As the evidence introduced on behalf of appellees, which was the only evidence in the case, shows they had no right of action, the judgment will be reversed but the cause will not be remanded.

Judgment reversed.

State of facts to be incorporated in the judgment.

We find that the original contract by which appellee

leased the premises in question was superseded by a new agreement entered into with the predecessor of appellant as owner of the lease. That by the new contract, the owner of the lease forebore to pull the casing from the well and in consideration thereof, appellees consented that Maxwell should have the privilege of using gas from this well with them for domestic purposes; that under the new arrangement no provision was made to pay appellees anything by the leasing company, for the use of the well and that appellees were not entitled to recover from appellant any rental therefor.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 24th *day of April A. D. 1916.*

Clerk of the Appellate Court.

PINION

199A 35

15/3

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the Seventeenth *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

199 I.A. 35

Frank Williams,

Appellee.

vs.

No. 72.

October Term, 1915

H. W. Moehlman,

Appellant.

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Marion COUNTY

TRIAL JUDGE

HON. THOMAS I. JETT.

Term No. 72. October Term, 1915. Agenda No.31.

Frank Williams, Appellee.	)	
v.	)	Appeal from Marion.
R. W. Koehlman, Appellant.	)	

Opinion by Higbee, P. J.

----oOo----

Appellee contracted with appellant to make him twenty five sample ironing boards at ninety cents each. At the time the contract was made appellant had with him, a model in minature of an ironing board, and those to be made by appellee were to be like the model with some slight variations. Just how far appellee was to be permitted to vary from the model, is a disputed question, on which the evidence was contradictory. After the models were finished, appellant refused to pay for them upon the ground that appellee had not made them to correspond exactly to the model exhibited to him by appellant. Suit was brought and appellee obtained a verdict and a judgment against appellant for the contract price of $22.50 and appellant has brought the record here for review.

It appeared from the proofs that after the 25 models were completed, appellant called at appellee's shop

[illegible]

[illegible] v. [illegible] [illegible] [illegible] appellant.) reversed [illegible].

Opinion by [illegible], J.

Appellee constructed its overflight to take his [illegible] five cents. Ironing boards at ninety cents each. [illegible] the same the contract was made appellant has [illegible] in [illegible] of an ironing board, and [illegible] to be [illegible] work done. Such is regarded to be [illegible] to vary from the model, is a disputed question, on which the evidence was contradictory. After the [illegible] jurisdiction, upon not [illegible] to say for them upon the [illegible] that appellee has not made [illegible] [illegible] to the model and [illegible] to [illegible]. [illegible] [illegible] and [illegible] a [illegible] [illegible] appellant for the [illegible] [illegible] [illegible] [illegible] the record [illegible] for review.

It appeared from the [illegible] [illegible] were completed, [illegible] [illegible]

and took away seven of them and that they were taken at random from the entire lot of manufactured samples. There were but three persons present at the time and they were appellant, appellee and an assistant of the latter named Greder. Appellee and his assistant testified that a leg of the sample did not stand at right angles or straight with the table, but with that defect remedied the samples would be all right; that a change was suggested in regard to the leg and the suggestion of appellant complied with. Appellant denied this conversation and says he never stated to appellee that if he would straighten up the leg the sample would be all right. He also stated that the sample differed in several particulars from the one he had furnished appellee. It further appeared that appellant at the time he took the seven samples offered to make a payment on the contract but that he did not do so because he was in a hurry and feared he might miss his train. Appellant further testified that after he got the seven samples home, he found that they varied so much from the model he could not use them. The model and one of the samples were made exhibits on the trial and the claimed differences in the two pointed out and submitted to the jury. The jury which saw the witnesses and heard them testify and also examined the model and the sample ironing boards, were in a position to weigh the evidence of the respective parties and also to determine whether the contract had in fact been substantially complied with. They found in favor of appellee and the evidence warranted them in so doing.

and took away seven of them one that they were taken at
random from the [illegible] lot [illegible]
There were but three [illegible] of the lot [illegible]
were compliant, supplies and on [illegible]
named [illegible].
[illegible] leg of the [illegible] side [illegible]
straight with the [illegible], but with [illegible]
sample would be all right: that a change [illegible] in
regard to the leg and the suggestion of [illegible] complied
with. Applicant denied this conversation [illegible]
never stated to complainant that his sample [illegible]
leg the sample would be all right. He also [illegible] that
the sample differed in several particulars [illegible]
he had furnished samples. It [illegible] that [illegible]
[illegible] at the time he took the seven samples [illegible]
a payment on the contract but that he did [illegible]
course he was in a hurry and [illegible]
Applicant [illegible] that [illegible] the seven
samples home, he found that they [illegible] from the
model he could not use them. The model and one of the
samples were made exhibits on the trial and the claimed
differences in the two [illegible]
the duty which [illegible]
also examined the model and the [illegible]
were in a position to [illegible]
[illegible] and also to determine [illegible]
that been substantially complied with. [illegible]
of model and the evidence [illegible]

Complaint is made of appellee's first instruction which told the jury if they found appellee had made the samples "and that the defendant afterwards accepted the same, or any part thereof and agreed to pay the plaintiff therefor, then they should find a verdict for the plaintiff"; and also of appellee's second instruction which told the jury that if they found from the evidence "that after the completion by the plaintiff, of the work agreed to be done by him for the defendant, that the defendant called and inspected the same, and accepted a part of the samples to be made and agreed to pay for all of them, then the law is that he is presumed to have accepted all of the work done for him by the plaintiff". There seems to be some ambiguity in the latter part of the sentence quoted in the first instruction, but we find no misstatement of the law in appellee's second instruction. The jury, however, could not have been misled by the ambiguity mentioned, as appellant's rights as to the law were fully covered by six instructions given for him which stated that there could be no recovery unless the samples were in accordance with the model furnished, were made according to contract and were not defective; also that if appellant did not intend to accept the ironing boards as completed according to sample but took them home with him for examination and within a reasonable time thereafter notified plaintiff that he could not and would not accept them, then the fact that he took the boards with him did not amount to an acceptance.

Complaint is made of an officer's first instruction which told the jury if they found a traffic violation [illegible] place that that the defendant affirmatively accepted the case, or may want thereof and agreed to pay the fight that therefore, then they should find a verdict for the defendant"; and also of another's second instruction which told the jury that if they found from the evidence "that after the commission by the defendant, of the work proved to be done by him for the corporation, that the defendant called and [illegible] the same, and accepted a part of the money for it [illegible] and agreed to pay for all of them, then the law in that case presumed [illegible] accepted all of the work done for him by the plaintiff". These seem to be some ambiguity in the latter part of the sentence quoted in the first instruction, but we find no misbehavior of the jury in an officer's second [illegible] the jury, how ever, could not have been misled by the well-fully worded, [illegible] the law is fully covered by the instructions given for him which stated that there could be no recovery unless the [illegible] were in accordance with the [illegible], were made according to contract and were not defective; also that if [illegible] did not intend to assume the [illegible] [illegible] completed according to [illegible] but [illegible] with his complaints and within a reasonable time [illegible] [illegible] [illegible] accept them, then he [illegible] at least as much as he made with him and not merely in an [illegible].

Appellee was asked in his examination as a witness, whether there was any objection made at the time by appellant to the seven boards he picked up and answered that there was none. It is complained by appellant that while the conversation between the parties concerning the models would have been competent, it was error to let appellee state his conclusion as to whether or not there was any objection made. As appellee had stated in his examination, all the conversation which took place at the time appellant took the seven samples, we do not think there was any error in permitting him to answer the question objected to, even if it could properly be said to call for a conclusion instead of a fact. Appellant also complains that objection was sustained to certain questions asked him and one of his witnesses, concerning the suitability or fitness of the samples made by appellee for the purpose for which they were intended. We find, however, that those witnesses were afterwards permitted to answer similar questions so that the question came properly before the jury and appellant's theory was duly presented. The judgment upon the whole record appears to have done substantial justice between the parties and the same will therefore be affirmed.

Judgment affirmed.

Not to be reported in full.

[illegible] in his examination [illegible],
whether there was any objection [illegible] to be taken by counsel
to the seven jurors [illegible] and answered that [illegible]
none. It is conceived by [illegible] that [illegible]
relation between the [illegible] and [illegible]
been constant, it was proper to [illegible] whose [illegible]
qualification or to whether or not there was any [illegible]
as regards had stated in his evidence [illegible]
tion might take place at the time [illegible]
counsel, we do not think there was any error in [illegible]
him to answer the question objected to, even if it [illegible]
improperly [illegible] and we call for a [illegible]
[illegible]
[illegible]
compelled for the purpose for which they were intended. [illegible]
[illegible]
[illegible]
only before the jury and unofficially [illegible]
sence. The judgment upon the whole record must be
have been substantial justice between the [illegible] and the
[illegible] therefore affirmed.

[illegible]

[illegible]

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 25th *day of April A. D. 1916.*

Clerk of the Appellate Court.

PINION

199 A 47

1575

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the Seventeenth *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Frank Diddea,

Appellant.

vs.

No. 77.

October Term, 1915

W. T. Page,

Appellee.

199 I.A. 47

ERROR TO
APPEAL FROM

Circuit COURT

Fayette COUNTY

TRIAL JUDGE

HON. W. P. WRIGHT.

Term No. 77. October Term, 1915. Agenda No.52.

Idel Didden, executrix, etc., of Frank Didden, deceased Appellant v. W. T. Page, Appellee	Appeal from Lafayette.

Opinion by Higbee, P. J.

This, a suit for fraud and deceit, was commenced by Frank Didden who died before trial, and it was then prosecuted by his administratrix, Idel Didden. The action grew out of an exchange of property between Didden and appellee. Didden owned a general stock of merchandise at Berger, Missouri, which he valued at $8,000. Appellee owned two lots and a building at Ramsey, Illinois. Appellee traded with Didden for the stock of goods, agreeing to take it at at the cost price and to pay for the same by deeding to Didden the Ramsey property at $4500, transferring to him a note for $1500 secured by mortgage on eighty acres of land in Indiana and paying the balance in cash. It is charged in the declaration that appellee represented to Didden that the note so secured by the mortgage was good and worth $1500, that the payor of said note was solvent and responsible and that Didden relied on such representa-

tions as true; that as a matter of fact such statements were false, the maker of the note insolvent and irresponsible and the land not worth at a fair cash value, more than $1.25 per acre, all of which facts were well known to said appellee. It was also charged that certain fraudulent statements were made by appellee as to the Ramsey property.

It is claimed by appellant that sometime after the trade was made, Biddes learned that appellee and one J.M. Thomas had taken a deed to the Indiana land described in the mortgage, from a man named Van Gibber and that Van Gibber had no title to the same at the time; that appellee then deeded the land to Ray Gibson and took from him a note secured by a mortgage on the premises, for $1500; that the land was worth not to exceed two dollars an acre; that appellee had traded the note to one Jacob Hite of Mt. Vernon, Illinois, prior to the time he assigned it to Biddes; that Hite having ascertained that the note and mortgage were worthless, compelled appellee to take them back upon threat of a criminal prosecution.

It appears from the record that upon the trial appellant proved by various witnesses, a portion of the foregoing facts and offered proof tending to substantiate all of them, but upon objection of appellee the court refused to hear further proof in support of appellant's case. Appellant, among other things, offered to prove by Mr. Hite of Mt. Vernon, that appellee, after the latter traded the note secured by the Indiana mortgage to him and he was threatened with arrest, admitted to said witness that the mortgage was

were taken, the maker of the note insolvent [illegible]
and the land not worth [illegible]
per acre, all of which facts were [illegible]
lee. It was also observed that certain [illegible]
were made by appellee on to the [illegible]

It is claimed by some that [illegible]
trade was made, Hodge learned that [illegible]
he had taken a deed to the Jackson land [illegible]
mortgage, from a [illegible] Hodge had
no title to the [illegible] Hodge
the land to Jay Gibson and took from him a [illegible] secured by
a mortgage on the property, [illegible] that the land was worth
not to exceed two dollars an acre; that [illegible] had traded
the note to one [illegible]. Vernon, [illegible], prior
to the time [illegible] to Hodge; that [illegible]
ascertained that [illegible] and mortgage were worthless, con-
tended appellee [illegible] upon [illegible] criminal prosecution.

[illegible] appellant moved by various witnesses, [illegible]
going facts and offered proof tending [illegible]
them, but upon objection of appellee the court refused to
hear further proof in support of [illegible]
Hart, among other things, offered [illegible]
it. Vernon, that appellee, after [illegible]
secured by the [illegible]
with account, admitted [illegible]

worthless and of no value and that this was before the time he traded it to Diddea. Appellee moved the court to direct a verdict in his favor and in accordance with such motion the court said: "Gentlemen of the jury, in the view of the court there has been no competent evidence offered to sustain the cause of action by the plaintiff, and the court has granted a motion to find the defendant not guilty." The jury were accordingly instructed to bring in a verdict in favor of appellee, which was done and judgment was entered against appellant for costs. The facts stated by appellant's witnesses and those things which the court refused to permit them to testify to, would at least tend to show that appellee was guilty of fraud and deceit as charged in the declaration, and it was a question for the jury to determine from the evidence, under proper instructions as to whether this proof made out a case in favor of appellant or not. We are of opinion that the court erred in refusing to admit the evidence referred to and also in instructing the jury to find in favor of appellee and in entering a judgment against appellant.

The judgment will therefore be reversed and the cause remanded in order that the questions of fact may, upon trial, be submitted to the decision of a jury.

Reversed and remanded.

Not to be reported in full.

worthless and of no value and that was [illegible]
the time he handed it to [illegible]. [illegible]
court to direct a verdict in [illegible] and in [illegible]
with such motion the court said: [illegible]
in the view of the court there [illegible] no [illegible]
dence offered to sustain the charge of [illegible]
tift, and the court was [illegible] a motion to find [illegible]
[illegible]
to bring in a verdict in favor of [illegible], which [illegible]
[illegible]
facts stated by counsel[illegible] witnesses and [illegible]
the court refused to [illegible] ".
[illegible] tend to show that counsel [illegible] the jury [illegible]
cent [illegible] in the deliberation, and it was a question
for the jury to [illegible] from the evidence, under [illegible]
instructions as to whether this [illegible] in
[illegible] important or not. [illegible] opinion that [illegible]
courtesy[illegible] in refusing to [illegible] the evidence [illegible]
and also in instructing the jury to find in favor of [illegible]
pellee and in entering a judgment against [illegible].

[illegible] judgment will therefore be reversed [illegible]
court proceed in order that the questions of fact [illegible]
trial, be submitted to the decision of a jury.

[illegible].

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 24th *day of April A. D. 1916.*

Clerk of the Appellate Court.

OPINION

e $.....

1576

199 A 48

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the Seventeenth *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

199 I.A. 48

George J. Stein, Admr. of the Estate of Elizabeth Stein, Deceased,
Appellee.

vs.

No. 79.

October Term, 1915

Chicago & Eastern Illinois Railroad Company and Wm. J. Jackson and Edwin W. Winter, Receivers, C. & E. I. R. R.,
Appellants.

ERROR TO
APPEAL FROM

Circuit COURT

Franklin COUNTY

TRIAL JUDGE

HON. J. C. EAGLETON.

Term No. 79. October Term, 1915. Agenda No.46.

George J. Stein, Administrator, etc., Appellee. v. Chicago and Eastern Illinois Railroad Company, et al. Appellants.	Appeal from Franklin.

Opinion by Higbee, P. J.

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This is a suit brought by appellee to recover damages under the statute, to the next of kin on account of the death of Elizabeth Stein, alleged to have been caused by the negligence of appellants' servants in operating one of its passenger trains, while passing through the city of Benton, Illinois. The declaration charges negligence generally on the part of the servants of appellant, in the management of its locomotive, engine and train of cars, negligence in failing to give the statutory signals in approaching a public crossing, negligence in failing to give the signals required by the ordinances of the city of Benton and negligence in running its train at a rate of speed prohibited by an ordinance of said city. Upon the trial there was a verdict in favor of appellee for $2500, for which judgment was entered, and a motion for a new trial having been

overruled, the Railroad Company had brought the record to this court for review.

Upon the question whether the signals required by the statute and said ordinances were given, the evidence as usualin such cases, was contradictory but the proofs showed that the train was running about 35 miles an hour, which was far in excess of the limit prescribed by the city ordinance. Appellants concede that the speed of the train constituted negligence on the part of the railroad company, but contend that the proofs also show that appellee's intestate was not in the exercise of due care and caution for her own safety at the time she received the fatal injuries and therefore no recovery can be had. ~~The proofs show that appellants'~~ track approaches ~~the city of~~ Benton, where the accident occurred, from the north, reaching its station on East Main street about a quarter of a mile east of the court house; that after leaving the station it continues south a quarter of a mile and then veers to the south west, intersecting south Main street, which runs north and south, nearly half a mile south of the court house. A short distance beyond this crossing is the city limits and beyond that a cemetery. Just before the tracks reach this crossing they enter a cut which grows gradully deeper as it extends further to the south west, and to meet the grade at the crossing South Main street declines for a distance of 80 to 100 feet towards the crossing, which leaves a bank at that place some three feet high along the left side of the street. On Decoration Day, May 30, 1914, at a little after eight o'clock in the morning, when ~~as it appears from the proofs,~~ the air was quiet and there were no noises, ~~appellee~~ decedent, with his wife Elizabeth

Stein, were going south on South Main street and had reached the north side of the railroad crossing. She was a woman 67 years of age, weighing 190 to 195 pounds, with no unusual infirmities. She was walking four or five feet in the lead of her husband, carrying a basket of flowers while he followed with a bucket of water. She started to cross the track and while about to step from the south side ~~thereof~~, was struck by an engine attached to one of ~~appellants'~~ appellees' passenger trains going southwest. She was thrown from 75 to 100 feet by the impact and received injuries which caused her immediate death.

As the negligence of appellant in running its train at a rate of speed prohibited by the ordinance of the city, is not contested, the only question raised for our consideration, is whether appellees intestate was at the time she was struck by the train, in the exercise of due care for her own safety. The theory of appellee is that the train was running at an excessive rate of speed without signaling as it approached the crossing, and that deceased was unable to see it come on account of the bank on the left hand side of the street. The last proposition we find no evidence to sustain, even on the part of appellee. Amory Ligon testified "I think that at the crossing you could see a train approaching as the cut is not very deep". "I know there is a cut there because you have to go down a slant to cross the railroad. From that point south to the east on the railroad crossing, I do not think there is anything to hinder a person from seeing an approaching train if he looks". Philip Schrade testified, "A person

walking along south Main street just north of the C.& E.I. crossing could see the approaching train; at times you could see it 200 or 300 yards." ~~Walter Wyant, who was on the train states, "I heard a stop signal there and a sudden stopping of the train. I looked out of the window and saw a lady just coming from behind, a little bank from where the train was at." "I would judge the embankment is about 3 feet high near the crossing".~~ These witnesses were all called on behalf of ~~appellee.~~ plaintiff, ~~Appellee~~ who himself testified, "When we first observed the train, Mrs. Stein was just a few feet from the right hand rail of the C. & E.I.Railroad, three or four or five feet, something like that. When I first saw the train I hollered to her not to try to cross... I saw the train coming. I suppose at that time she could have seen the train if she had looked but guess she thought she could get across."

On the part of ~~appellant~~ defendant two witnesses, Jacob and Anna Horine, who were up the street behind Mrs. Stein and are in no ways interested in the event of the suit, swore she stopped and looked at the train and then started to run across the track and beat the train. To warrant a verdict of guilty it was not only necessary for appellee to prove negligence on the part of appellant but also to prove the exercise of due care and caution on the part of appellee's intestate. If the surroundings were such that she could have seen the train had she looked for it but neglected so to do, or having seen it attempted to cross in front of it, she, in either event, failed to exercise reasonable care in approaching and going on the crossing. That she could have

seen the train before she went on the track, is clearly proven by appellee's own witnesses while the witnesses above referred to on the part of appellants, showed that she did see it and tried to pass in front of it and these witnesses for appellants were to some extent, corroborated by the testimony of appellee himself as above set forth.

The proofs in the record show that the verdict was manifestly against the weight of the evidence and for that reason the judgment will be reversed and the cause remanded.

Reversed and remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 24th *day of April A. D. 1916.*

Clerk of the Appellate Court.

OPINION

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STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

199 I.A. 60

MARCH TERM, A. D., 19 15

At an APPELLATE COURT for said Fourth District, State of Illinois, begun and held at Mt. Vernon, in said State, on the 23d day of March, the same being the Fourth Tuesday in said month of March, 19 15, said term of said Court being held according to law.

PRESENT:

Hon. THOMAS M. HARRIS, Presiding Justice

Hon. HARRY HIGBEE, Justice

Hon. JAMES C. McBRIDE, Justice

CHARLES C. JOHNSON, Clerk

THOMAS E. PASLEY, Sheriff

Court opened by proclamation.

ATTEST:

Charles C. Johnson, Clerk.

BE IT REMEMBERED, that afterward, to-wit: On the 1st day of December, A. D. 19 15, there was filed in the office of the said Clerk of said Court, an opinion of said Court, in words and figures following, to-wit:

Term No. 34 In the Agenda No.45

Appellate Court of Illinois

Fourth District

March Term, A.D. 1915.

Annie Lovas, Minor, by Annie Lovas, her next friend, Appellee	Appeal from the
-vs-	City Court of Granite City, Madison County.
Independent Breweries Company, Appellant	

Opinion by Boggs, J.

Appellee, a minor, by Annie Lovas, her mother as next friend, recovered a judgment against appellant for $7000.00 in the City Court of Granite City, Madison County, Illinois, in an action on the case brought to recover damages for personal injuries.

The suit as originally instituted was against appellant and the Wagner Brewing Company, which latter defendant was dismissed from the case during the trial. The original declaration consisted of three counts. Subsequently, by leave of Court, two additional counts were filed. To the original declaration and the first additional count a general and special demurrer was sustained. Leave was given to amend said first additional count to the declaration and also to file the second additional count.

Thereupon appellee dismissed her case as to the original counts of her declaration and by leave of court amended both additional counts. Said additional counts as amended were substantially alike, and charged, in substance, that on October

2, 1913, and prior thereto, the defendant, Wagner Brewing Company, and appellant were the proprietors and in charge of the two-story frame building in question; that Annie Lovas, the mother of appellee, on said date and since has rented said building of the defendants and has occupied and resided in the same; that on said date the porch on the second floor in the rear of said building and the railing thereon were defective, in that said railing was rotten at each end and the nails therein were rusted; that the said defects were secret and latent and were known to the defendants, but were unknown to appellee's mother and appellee, and could not have been known to them by the exercise of due care and by careful examination and observation; that appellee was nine years of age, and resided with her mother in said premises; that on July 7, 1914, while appellee was leaning against the said railing of said porch, and while in the exercise of due care for her own safety, she not knowing of the dangerous condition of said railing, the said railing gave way and fell, thereby causing her to fall to the ground, ~~and~~ injuring her, etc.

The building in question is a two-story frame structure containing two large rooms downstairs used as a saloon room and grocery store, and eight rooms upstairs used for living rooms. The porch in question is on the second floor, at the rear of the building, and can be reached either by a stairway leading up from the ground on the outside or from a stair on the inside of the house. A hallway on the second floor runs through the entire middle of the building, dividing the upstairs rooms into groups of four on each side, and opens through a door onto this porch. The porch is about twenty-two feet from the ground. It extends along the north end of the house and is about fifty feet long from east to west and about seven feet wide. It has a banister or railing from two and one half to three feet high around the three sides, except where the outside stairway enters it. This porch has

always been used by the occupants of the building in connection with the living rooms. Since the building was first erected one Steve Santas rented the grocery store, also called the butcher shop, and has been in possession of it continuously. He paid rent therefor directly to appellant since appellant owned the building. Santas has also occupied two rooms upstairs.

From March, 1913, to about October 2, 1913, one Paul Byous was a tenant in the building and rented the saloon room downstairs and the upstairs rooms. On October 2, 1913, Mrs. Lovas and one Slasack, as partners under the firm name of Slasack & Co., bought out the saloon business of Byous, and also his interest as tenant of the property. Mrs. Lovas with two of her children moved into the building and took possession the same day. Several days later her other two children from St. Louis joined her, and thereafter resided with their mother in the property.

Mrs. Lovas, or her firm, made no written lease with appellant. They bought out the Byous business and Mrs. Lovas went into possession under ~~an~~ oral letting. Mrs. Lovas, the day before she went into possession, called Mr. Griesedieck, general manager for appellant at Granite City, by phone, to get appellant's consent to her moving into the property. At that time she stated to him that she was anxious to have the saloon and would like to get the place; Mr. Griesedieck told her that she would have to buy out the Byous business and interest, and make her arrangements with Byous.

After Mrs. Lovas moved into the property, October 2, 1913, the saloon business was conducted and the building rented and occupied by Slasack & Co. They continued as tenants and to conduct the business in that name until about January 2, 1914, when Slasack sold out his interest to Mrs. Lovas, and Mrs. Lovas took in her brother, Joe Crozier,

as a partner, and the firm then became Crozier & Co. Since January 2, 1914, to the present time, the business has been conducted and the building rented in the name of Crozier & Co. Both Slasack & Co. and Crozier & Co. paid the same rent as was paid by Byous, namely, $55.00 per month.

Appellee bases her whole case on the contention that at the time her mother, Mrs. Lovas, moved into the property and rented it as aforesaid, the porch and this banister on the east end of the porch contained secret and latent defects, in that the ends of the railings were rotten and the nails therein rusty; that such defects were known to appellant but were unknown to appellee or her mother, and could not have been discovered by them by the exerdise of due care and proper examination and observation of said railings; that appellant failed to disclose such defects to appellee or her mother, but concealed such defects from them; and that such defects existing on October 2, 1913, and appellant's concealment of them and failure to disclose them to appellee or her mother at that time was the proximate cause of appellee's injuries received July 7, 1914.

Appellant practically concedes in their argument that if such defects were secret and latent and if known to appellant, and were unknown to appellee or her mother, and were not disclosed to appelle or her mother, and by reason thereof the injury occurred, that appellant would be liable. This, we understand, to be the law. (Shields v. J.H.Dole Co. 186 Ill.App.256; Sunasack v. Morey, 196 Ill.571; Borggard v. Gale, 205 Ill.511; Cohen v. Plumtree, 170 Ill.App.311.)

The principal assignment of errors relied upon by appellant for a reversal of this cause are, first, that the verdict of the jury is against the manifest weight of the evidence; second, the refusal of the court to give certain instructions offered by it and third, because the trial court permitted two of the counsel for appellee to address the jury at the close of the

case when appellant had elected not to make any argument.

The question of fact submitted to the jury in this case was whether at the time appellee's mother rented the premises of appellant the banister on the east end of the porch in question contained secret and latent defects, which were known to appellant , but which were unknown to appellee or her mother, and which appellant did not disclose to the mother of appellee, and whether or not the concealment of said defects or the failure to disclose them to appellee or her mother was the proximate cause of appellee's injury.

The evidence touching this issue of fact was conflicting. The witnesses on the part of appellee testified that there were secret and latent defects in connection with the banister on the porch in question; that the attention of appellant was called to such defects by the former tenant prior to the time the same were rented to appellee's mother; that said banister was not repaired but remained in said defective condition from October 2, 1913, when appellee moved into said premises to July 7, 1914, the date of the injury. Anna Lovas, mother of appellee, testified that the top railing of the banister looked all right, and that she did not know of its defective condition either at the time said premises were rented by her from appellant, nor at any time thereafter up until after the accident. Appellee testified that she knew nothing of the defective condition of the banister. On the other hand appellant's witnesses testified that no notice was given them by appellee or by the former tenant of said premises of the defective condition of said banister.

One of appellant's witnesses, a carpenter, who was in its regular employ and whose duty it was to look after its different buildings testified that he repaired this banister and the railing around the porch on October 1, 1913, and again repaired the same on October 18, 1913; that he placed

said banister in good sound condition. This evidence, to say the least, makes the position of appellant more or less inconsistent, for according to its own testimony it did know of the condition of this porch and that the same was in need of repairs not only on October 1, 1913, but again on October 18, 1913. There was sufficient evidence in the record to warrant the jury in finding that there were secret and latent defects in the railing around the porch in question at the time appellee moved in said premises, and that no repairs were made on the same until after said accident, and their finding on said question should not be disturbed.

Another point urged in the argument by appellee is that in as much as the porch in question was a common porch used by all of the occupants in the second story of the building in question, that therefore, appellant would be required to keep up the repairs on this porch for the reason that it would not be in the exclusive possession of either of said tenants. Had this feature of the case been presented by the pleadings we are inclined to the opinion that the point would be well taken. (Shoninger Co. v. Mann, 219 Ill. 242; Payne v. Irvin, 144 Ill. 482; Mueller v. Phelps, 252 Ill.630; Cowen v. Story & Clark Piano Co.,170 Ill.App.92; Johnson v. Perkins, 167 Ill. App. 617.).

It is next contended by appellant that the court erred in refusing certain instructions offered by appellant. Only one instruction was given on the part of appellee. Appellant tendered thirty-eight instructions to the trial court, twenty-one of which were given; seventeen were refused. Appellant's counsel practically concede in their brief that several of the refused instructions were covered by instructions given. They insist, however, that instructions No. eight, twenty-five, twenty-seven, twenty-eight, thirty and thirty-seven, should have been given. Instruction number eight offered by appellant is to the effect that if the jury should find from the evidence that the appellee

or her mother did not use that degree of care which would have been exercised by an ordinary prudent person under like circumstances, conditions and surroundings and that such lack of care on the part of appellee or her mother contributed to cause appellee's injury, then appellee was not entitled to recover. We do not think the court erred in refusing this instruction as it does not, in our opinion, state a correct principle of law. To begin with, appellee, being a child, ten years of age, at the time of the accident would not be required to use that degree of care that would be exercised by an ordinary prudent person under like circumstances. Neither is appellee bound by the negligent conduct of her mother where the action is brought for the benefit of appellee herself. (Ohnesorge V. Chicago City Ry. Co. 259 Ill.424; Chicago City Ry. Co. v. Wilcox, 138 Ill. 370; Perryman v. Chicago City Ry. Co. 242 Ill 269; Ballentine v. Illinois Central Railroad Co. 157 Ill.App. 295.)

Refused instructions 25, 27, 28, 33 and 37 we think are covered by the instructions that were given on behalf of appellant. The matter contained in refused instruction twenty-five was covered by the given instructions nineteen and thirty-five. Refused instructions twenty-seven and twenty-eight are covered by given instructions, nineteen and twenty-six. Refused instruction thirty-three is covered by given instruction thirty-one. Refused instruction thirty-seven is covered by given instructions nineteen, twenty-six, thirty-one and thirty-five. The practice of submitting so large a number of instructions as were submitted in this case, has frequently been condemned as a mischievous practice and is one which in our judgment should not be countenanced by the courts. Instead of assisting the jury in a proper determination of the questions of fact, it more frequently misleads and confuses them. (Donnely v. Chicago City Ry. Co. 235 Ill.35; Kravitch v. Chicago City

Ry. Co. 174 Ill.App. 182; West Chicago Street R.R.Co. v. Petters, 196 Ill.298; Wood v. I.C.Ry. Co. 185 App. 180.)

It is next insisted that the court erred in allowing two of appellee's counsel to address the jury after the close of the case. It seems that the practice prevails in the City Court of Granite City of limiting the counsel for each party to thirty minutes in their argument to the jury at the close of the evidence, unless further time is given on application to the court. In this case, it seems, that counsel for appellee applied to the court before the argument for additional time, and that the court announced that forty minutes would be allowed each side for argument of the case. After one of appellee's counsel had finished his argument, addressing the jury some twelve minutes, counsel for appellant announced that they would waive their argument, and moved the court to submit the case to the jury without further argument. The court refused to do so, but allowed another of appellee's counsel to address the jury for twenty-eight minutes, making up the forty minutes. The court took the position that each side was entitled to the time allotted for the argument. No argument was made by appellant's counsel and they now insist that the trial court committed reversible error in this ruling.

So far as we know, this particular question of practice has never been passed upon by the Supreme or by any of the Appellate Courts in this State. As we view the matter, even if this should be held to be an irregularity, it would not, in this particular instance require a reversal of the case. What we say in regard to this matter of practice applies only to the conditions obtaining in this particular case and we are not assuming to say here that the practice was a proper or improper one, we are not expressing any opinion in regard thereto.

With reference to the rulings of the court on the evidence, an examination of the record discloses that in nearly every instance the court sustained objections to any questions that were not proper, so that we feel that neither side in this case were injured by the rulings of the court in that regard.

One of the assignments of error is that the verdict is excessive. This assignment, however, was not argued by appellant. We are inclined to the opinion that on account of the serious injury received by appellee, the verdict was not excessive. The evidence shows that a large section of the scalp was removed and that the brain is only protected by the skin and exposes appellee at all times to injuries that might result seriously.

There were other errors assigned on the record but as they were not seriously contended for in the argument in appellant's brief, we do not deem it necessary to discuss the same.

Finding no reversible error in the record, the judgment of the trial court is affirmed.

Affirmed.

Not reported in full

I, JAMES R. MCLAUGHLIN, *Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.*

In TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 21st *day of* July, *A. D. 19* 61.

James R. McLaughlin

Clerk of the Appellate Court.

OPINIO

14 (19055—6-60)

199 A 76

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the ----17th---- day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

199 I.A. 76

Pete Bagaini,
Appellee.

vs.

No. 41.

March Term, 1915

Donk Bros. Coal & Coke Company,
Appellant.

ERROR TO
APPEAL FROM

Circuit COURT

St. Clair COUNTY

TRIAL JUDGE

HON. GEORGE A. CROW

Term No. 41. In the Appellate Court Agenda No.48.

of Illinois, Fourth District.

March Term, A. D. 1915.

Pete Magaini, Appellee. vs. Monk Bros. Coal & Coke Company, Appellant.	Appeal from the Circuit Court of St.Clair County.

Opinion by Boggs, J.

This was a suit brought by appellee at the January Term, 1914 of the Circuit Court of St. Clair County, to recover for an injury alleged to have been received by him on January 29, 1913, while working in the mine of appellant near Maryville.

At the time of his injury ~~appellee~~ plaintiff was 39 years old ~~of age~~, and had been working ~~at the rate of~~ for coal mining for ~~a great number of~~ many years. He had been examined ~~by the mine examiner's board~~ as provided by statute and held a miner's certificate. For sometime prior to January 29, 1913, the date of his injury, ~~appellee~~ plaintiff had been mining coal in rooms 15 and 16 off of the second south entry in the mine ~~of appellant near Maryville.~~ defendant. In that mine the miners prepared and fired their own shots. At the time in question room 16 had been driven about seventy feet and was about thirty-two feet wide. The time for firing shots in that mine was

Term No. 41. In the Appellate Court
of Illinois, Fourth District.
March Term, A. D. 19[illegible].

[illegible]

vs.

[illegible] Coal & Coke Company,
Appellant.

[illegible] Appellee.

Opinion by [illegible], J.

This was a suit brought by appellee [illegible] Company, Inc., [illegible] of the Circuit Court of [illegible], [illegible], to recover for an injury alleged to have been received by him on January 20, 1[illegible], while working in the mine of [illegible]

[illegible] the time of the injury [illegible] and had been working [illegible] for [illegible] company. He had been [illegible] workmen's compensation [illegible] provided by [illegible] company's constitution. On [illegible] the time of the injury, [illegible] zones 18 and 19 out of the seven zones [illegible] and hired [illegible] 18 had been driven [illegible] 19 [illegible] not wide. The [illegible] was

from three to three-thirty P.M. On the day ~~appellee was~~ appellee was injured he had prepared two shots, both placed in the face of the coal, one at the center and the other near the right rib. There was a car track ~~in the room in said~~ in the center of the room which ~~and~~ came ~~up to~~ within ~~about~~ eight or ten feet of the face of the coal, ~~extending out and~~ connecting with the track in the entry. About three to three-thirty P.M. on the afternoon of the day ~~in question appellee proceeded to~~ fired the shots, ~~which he had placed in room 16 for the purpose of shooting down the coal.~~ Neither ~~of the~~ shots did its work, ~~but~~ both blew out the tamping and ~~did~~ not bring down the coal. ~~It is conceded by both sides that~~ One of said shots caused the injury ~~to appellee combined of~~, being the loss of the sight of both eyes.

The original declaration filed by appellee at the January Term 1914 consisted of one count. At the September Term 1914 by leave of court, appellee abandoned said original count and filed an amended declaration consisting of eight counts. On the trial of said cause the court directed the jury to disregard the seventh Count.

~~The first count charged~~ that on ~~the 20th day of January~~ 29, 1913, Room 16, leading off of the second south entry of the eleventh west, in defendants mine near Mary Ville, had been developed about seventy-five feet and contained a railway track on which cars were drawn by mules; that the defendant ~~appellant~~ had permitted ~~slate, and~~ other debris to remain along each side of ~~said~~ the track, so that the only passage way to and from the face of coal in said room was between the rails of ~~said~~ the track, and that the miners ~~engaged therein~~ traveled between the rails

from three to three-thirty [illegible]. On the day [illegible] injured he had prepared two shots, both placed in the face of the coal, one at the center and the other near the right rib. There was a [illegible] in the center and came within about eight or ten feet of the face of the coal, [illegible] ing with the track in the entry. About [illegible] thirty [illegible], on the afternoon of the day [illegible] pellee proceeded to fire the shots, [illegible] in room 16 for the purpose of shooting down the coal. Neither of the shots did its work, [illegible] both blew out the tamping and did not bring down the coal. [illegible] by both sides that one of said shots caused the injury to appellee complained of, being the loss of the sight of both eyes.

The original declaration filed by appellee at the January Term 1914 consisted of two counts. At the September term 1914 by leave of court, appellee dismissed said original counts and filed an amended decla ration containing six sixth counts. On the trial at such course the court directed the jury to direct a verdict for the defendant. [illegible] January, 1915, upon the opening of the second trial entry of the eleventh week, had been developed [illegible] seventy-five feet and contained [illegible] which were drawn by mules; that the [illegible] and other debris to remain along [illegible] track, so that the only passage way [illegible] coal in said room was between the [illegible] wall, and that the miners employed therein [illegible] the while

~~of said track~~ to and from their work; that ~~appellee~~ defendant was a miner in that ~~said~~ room, ~~and that it was~~ there his duty to load coal into cars brought ~~to said room~~ by drivers, and to prepare and fire shots; that during the afternoon of that ~~said~~ day, he loaded two cars ~~on said track~~ and afterwards prepared certain shots in the face of the entry in said room; that ~~appellant~~ defendant negligently permitted the ~~said~~ cars ~~of coal~~ to be and remain on the ~~said~~ track and thereby obstructed ~~the~~ such passageway ~~into and from the working place in said room~~, ~~and~~ rendered it ~~the same~~ unsafe and dangerous of which ~~appellant~~ defendant well knew, or by the exercise of ordinary care should have known; that before leaving ~~said~~ the room he lighted a fuse in one of said shots; that the said fuse flared and sputtered and extinguished his cap light and left him in total darkness, and that while endeavoring to leave ~~said~~ the working place to avoid the explosion of said shot he came in contact with ~~said~~ the cars and was thereby caused to fall down and against ~~said slat, and other~~ the debris; ~~that he was~~ being thereby stupified and upon arising ~~he~~ endeavored to find his way out of ~~said~~ the room, but on account of the darkness and the fall he received, he became confused and bewildered and approached near said shot, and the said shot exploded and injured him, etc.

The second count charges that ~~appellant~~ defendant negligently allowed debris to remain along and near ~~said~~ the track in ~~said~~ the room so that miners were prevented from using the sides thereof and thereby the debris rendered the passage out of the ~~said~~ place by miners unsafe in that they were likely

to come in contact with the ~~said~~ debris and be delayed and injured and that ~~appellee~~ plaintiff after lighting the shot ~~in said room~~ attempted to escape ~~therefrom~~ and came in contact with the ~~said~~ debris and afterwards became injured, etc.

The negligence charged in the third count consists in the unlawful failure of the defendant mine examiner of ~~appellant unlawfully failing and omitting~~ to inspect the room, etc., where ~~appellee~~ plaintiff was working.

The fourth count charged that defendant ~~appellant~~ wilfully failed to keep one side of the haulage road clear of refuse other than timber for a distance of two and one half feet from the rails in such haulage road for the free passage of men to and from their work.

The fifth count ~~based upon the~~ charged that ~~appellant~~ defendant wilfully failed to maintain places of refuge in ~~said~~ the room as required by statute.

The sixth count charged that defendant ~~appellant~~ wilfully failed to maintain a cross cut not more than fifty feet from the rib.

The eighth count charged that defendant ~~appellant~~ ordered and directed plaintiff ~~appellee~~ to fire certain shots in the room and that the mine examiner wilfully failed and omitted to instruct him concerning the handling of explosives.

~~The first count of appellee's declaration alleges facts in connection with appellee's alleged cause of action pretty much as testified to by him on the trial.~~ To the amended declaration defendant ~~appellant~~ filed a plea of the general

to come in contact with ~~some~~ debris and be injured and injured and that ~~another~~ after lighting the [illegible] ~~and~~ ~~[illegible]~~ attempted to escape therefrom and came in contact with ~~said~~ debris and otherwise become injured, etc.

The negligence charged in the third count is in the mine examiner of ~~[illegible]~~ ~~[illegible]~~ ~~something~~ to inspect the room, etc., ~~where~~ ~~[illegible]~~ working.

The fourth count charges that ~~[illegible]~~ wilfully failed to keep one side of the haulage road clear of ~~[illegible]~~ other than timber for a distance of two and one-half feet from the ribs in such haulage road for the ~~[illegible]~~ room as required by statute.

The sixth count charges that ~~[illegible]~~ wilfully failed to maintain a cover out not more than fifty feet from the rib.

The eighth count charges that ~~[illegible]~~ a fence and ~~[illegible]~~ to fire certain ~~[illegible]~~ in the room and that the mine examiner wilfully failed and neglected to inform ~~[illegible]~~

~~[illegible]~~

~~[illegible]~~

~~[illegible]~~

issue. A trial was had resulting in a verdict for $10,000.00. A motion for a new trial was made and overruled and judgment was rendered on the verdict, from which judgment appellant prosecutes its appeal.

A great many errors were assigned on the record by appellant but the principal grounds relied upon by it for a reversal of this cause are that the court erred in the giving of instructions on behalf of appellee and in refusing instructions offered by appellant; that the verdict is against the manifest weight of the evidence and that it is excessive.

Appellant contends that the court erred in giving the third, fourth, fifth, sixth and seventh instructions given on behalf of appellee. These instructions are based on different provisions of the Mining Statute and are each in the language of the Statute and are abstract in form. Instruction No. 3 is based on the provision of the Statute with reference to the duty of the Mine examiner to make an examination of the mine with reference to its underground workings, for obstructions in rooms, roadways, etc. and with reference to marking dangerous places. It is urged by appellant that this instruction is bad because of its abstract form and because it is insisted there is no evidence on which to base the same. We are inclined to think that this instruction is proper, except we do not think that it should have been given in its abstract form without some other instruction applying the law as stated in this instruction to the facts as found by the jury.

issue. A trial was had resulting in a verdict for [illegible]. A motion for a new trial was made and overruled and judgment was rendered on the verdict, from which judgment appellant prosecutes its appeal.

A great many errors have been assigned on the record by appellant but the principal grounds relied upon for a reversal of this cause are that the court erred in the giving of instructions on behalf of appellee and in refusing instructions offered by appellant; that the verdict is against the manifest weight of the evidence and that it is excessive.

Appellant contends that the court erred in giving [illegible] given on behalf of appellee. These instructions are based on different provisions of the [illegible] and are each in the language of the statute and [illegible] in [illegible] with reference to the duty of the [illegible] make an examination of the mine with reference to its underground workings, for obstructions in room, roadways, etc. and with reference to marking dangerous places. It is urged by appellant that the instruction is not language of the statute and because it is insisted there is no evidence on which to base the same. We are inclined to think that this instruction is proper, except we do not think that it should have been given in the abstract form and some other instruction embodying the language stated in the instruction to the [illegible] by the jury.

Instruction four is based on the statute providing that one side of all haulage roads shall be kept clear of refuse, etc., for a distance of two and one half feet from the rail. We think this instruction was proper, except that its abstract from would be misleading without some other instructions explaining to the jury the relation of the law stated to the facts as found by them.

Appellee's fifth instruction is based on the provision of the statute, that on all haulage roads on which the hauling is done by draft animals, etc. whereon men are obliged to be in the performance of their duties or have to pass to and from their work there shall be refuge places, etc. Waiving the question as to whether under the Mining Statute this track is a haulage way, this instruction in our opinion was improper and misleading and should not have been given as the evidence in the case discloses that the rib of said room where Appellee's intestate was working was more than two and one-half feet from the rail of said track and therefore, under paragraph 'e', of Section 15 of said statute, it was not necessary to provide refuge places, but all that is required under said statute in such case is that refuse, etc. should not be permitted within two and one-half feet of said rail.

Appellee's sixth instruction is as follows: "So far as the sixth count of plaintiff's amended declaration is concerned, and the statute in relation to mines and miners, at and prior to the date of plaintiff's injury, provided, among other things, as follows: 'After the taking

Instruction four is based on the statute prohibiting that one side of all highway roads shall be kept clear of refuse, etc., for a distance of two and one-half feet from the rail. [illegible]

except that its abstract from would be misleading without some other instructions explaining to the jury the application of the law stated to the facts as found by them.

A parallel fifth instruction is based on a misvision of the statute, that on all highway roads on which the hauling is done by small wagons, etc., vehicles are obliged to be in the performance of their business or have to pass to and from their work there small or other places, etc. Giving the question as to whether [illegible] instruction in our opinion was improper and misleading and should not have been given as the evidence in the case discloses that the rib of said road where [illegible] intermittent use working was [illegible] than two and one-half feet from the rail of said track and [illegible], under [illegible] 'e', of a citation of said statute, it was not necessary to provide refuge places, but all that is required under said statute in such case is that [illegible], etc. should not be permitted within two and one-half feet of the rail.

Appellee's sixth instruction is as follows: "[illegible] for on the sixth count of plaintiff's amended declaration is concerned, and the statute in relation to [illegible] mirrors, at and prior to the time [illegible] provided, among other things, as follows: [illegible]

effect of this act, the first cross-cut in the first room off any entry shall not be more than fifty feet from the rib of the entry, and the first cross-cut in the second room shall not be more than eighty feet from the rib of the entry subsequently first cross-cuts in all the rooms shall be not more than fifty and eighty feet, respectively, from the rib of the entry.'" We think it was error to give this instruction for the reason we do not believe that there is any evidence in the record to which this instruction is applicable. The court gave appellant's instruction twenty-six to the effect that under the statutes of the state of Illinois it was not required to have a cross-cut between rooms situated as rooms fifteen and sixteen were until such rooms were driven eighty-feet. The error in so giving instruction six would not be cured by the giving of appellant's instruction twenty-six, for taking the two instructions together, they would tend to confuse the minds of the jury, rather than to enlighten them on the issues to be determined by them. The primary purpose of a cross cut between rooms is to furnish ventilation and in the mining statute it has reference more particularly to the health of the miners than to their safety. We would not, however, say that said statute may not be taken into consideration where the question of the safety of the miners are concerned, but that is not the primary object of the provision of the statute in question. Pettinger & Davis, P. & D. Co. v. Gettleman 126 App. 549; Ocean v. Big Muddy Coal & Iron Co. 128 App. 131.

effect of this act, the first crane-out in the lower room of any entry shall not be more than [illegible] feet [illegible] of the entry, and the first crane-out in the second room shall not be more than [illegible] feet from the rib of the entry subsequently first crane-outs in all the rooms shall be not more than fifty and eighty feet, respectively, from the rib of the entry." We think it was error to give this instruction for the reason we do not believe there was any evidence in the record to which this instruction is [illegible]. [illegible] six to the effect that under the evidence of the state of Illinois it was not required to have a crane-out between rooms situated as rooms fifteen and sixteen were [illegible] such rooms were driven eighty-feet. The court in refusing instruction six would not be guided by the ruling of appellant's instruction twenty-six, for taking the instructions together, they would lead to confusion [illegible] the jury, rather than to enlighten them [illegible] to be determined by them. The primary purpose of a crane-out between rooms is to furnish ventilation and in the mining statute it has reference more particularly to the health of the miners than to their safety. It would not, however, say that with statute may not be taken into consideration where the question of the safety of the miners was concerned, but that is not the primary object of the statute in the case in question. [illegible] v. [illegible], [illegible] Illinois 126 Ill. 549; [illegible] v. [illegible], [illegible] Ill. [illegible].

Instruction seven given on behalf of appellee is based on the provision of the statute that the mine manager shall give special attention to and instructions concerning the proper storage and handling of explosives in the mines. This instruction is also in the language of the statute, and is abstract in form, and for that reason we think the instruction is misleading, in as much as the court did not give any other instruction that would enlighten the jury with reference to the relation between the law stated in this instruction and the facts as they might find them from the evidence. Otherwise, we think this instruction was proper, as we are inclined to hold that it is a question of fact to be determined by the jury whether an experienced miner, who holds a certificate as such, under the provisions of the Statute, but whose business is not that of an expert shot firer as contemplated by the statute, should be instructed by the mine manager with reference to the handling of explosives, and whether his failure to so instruct said miner is negligence. The evidence in this case on thepart of appellee is to the effect that he had had some experience with reference to firing shots, but that there was some matters in connection with the same that he did not know about. On the other hand, the evidence on the part of appellant is to the effect that appellee was a skillful experienced shot firer and that he needed no instructions from the mine manager. It was therefore a question of fact for the jury as to whether or not

Instruction never given on behalf of relator

is based on the provision of the statute that the mine manager shall give special attention to and instructions concerning the proper shoring and timbering of coal-layers in the mines. This instruction is also in the language of the statute, and is abstract in form, and [illegible] we think the instruction is misleading, in [illegible] court did not give any other instruction [illegible] lighten the jury with reference to the relation between the law stated in this instruction and the [illegible] might find them from the evidence. Moreover, we think this instruction was proper, as we are [illegible] that it is a question of fact to be determined by the jury whether an experienced miner, who holds a certificate as such, under the provisions of the statute, but whose business is not that of an expert mint [illegible] formulated by the statute, should be instructed by the mine manager with reference to the handling of coal-layers, and whether his failure to so instruct said miner is negligence. The evidence in this case on behalf of appellee is to the effect that he had had some experience with reference to firing shots, but that there was some doubt in connection with the same that he did not know effect. On the other hand, the evidence on the part of appellant is to the effect that appellee was a skillful experienced coal miner and that he needed no instructions from the mine manager. If so, there-fore a question of fact for the jury [illegible] or not

appellant's mine manager was guilty of negligence in failing to instruct appellee with reference to the handling of explosives and the firing of shots in said mine.

At the close of appellee's evidence and again at the close of all the evidence, motions were made by appellant to exclude the evidence and instruct the jury to find appellant not guilty, which motions were overruled and said instructions were refused. It is contended by appellant that the court erred in refusing to direct a verdict of not guilty. The question raised by this motion is whether the evidence of appellee tended to support the allegations of his declaration or some one count thereof. Without going into the evidence in detail it is only necessary for us to say that the evidence of appellee, considered alone, tended to support certain of the counts of his declaration, that being true, there was no error in the court refusing to give said peremptory instructions.

Appellant also offered separate instructions at the close of the evidence directing the jury to disregard the several counts of appellee's declaration, each instruction offered designating particular counts. We are inclined to believe that no right of recovery was shown by appellee as to the fifth, and sixth counts of his amended declaration and that the instructions offered by appellant directing the jury to disregard the same should have been given, and it was error to refuse the same. What we have said with reference to the fifth and sixth instructions given on behalf of appellee sufficiently states our reason why the

instructions to disregard said fifth and sixth counts should have been given.

It is also insisted by appellant that the court erred in refusing to give the first, second, third, fourth, fifth, eighth, ninth, tenth, twelfth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third and twenty-fourth instructions tendered by it. The twelfth instruction tendered by appellant submitted the question to the jury as to whether or not the negligence of appellee was the sole proximate cause of his injury and informed them that if they so found, that they should return a verdict of not guilty. This instruction, we think, should have been given, but an instruction should also have been given in connection with this, defining "proximate cause" as no instruction was tendered by either appellee or appellant defining what is meant by "proximate cause" and this should have been done. Policemen's Benevolent Ass'n. v. Myce.213 Ill.9; Geringer v. Novak, 117 App.160; C. & A. R. R. Co. v. Pelligreen, 65 App.334.

Instruction sixteen tendered by appellant is practically of the same character as instruction number twelve and we think states a correct principle of law. Appellant's instruction twenty-one in our judgment also states a correct principle of law and should have been given. As to the remainder of appellant's refused instructions, it is only necessary for us to say that we have examined the same and that it is our opinion the court did not err in refusing

instructions to disregard said fifth and sixth counts should have been given.

It is also insisted by appellant that the court erred in refusing to give the first, second, fourth, fifth, eighth, ninth, tenth, twelfth, sixteenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second and twenty-third instructions tendered by it. The twelfth instruction tendered by appellant submitted the question to the jury as to whether or not the negligence of appellee was the sole proximate cause of his injury and informed them that if they so found, that they should return a verdict of not guilty. This instruction, we think, should have been given, but an instruction should also have been given in connection with this, defining "proximate cause" as no instruction was tendered by either appellee or appellant defining what is meant by "proximate cause" and this should have been done. Policemen's Benevolent Ass'n v. Ryce, 213 Ill. 9; [illegible], [illegible]; [illegible] v. Pelligreen, 65 App. 334.

Instruction sixteen tendered by appellant is practically of the same character as instruction number twelve and we think states a correct principle of law. Appellant's instruction twenty-one in our judgment also states a correct principle of law and should have been given. As to the remainder of appellant's refused instructions, it is only necessary for us to say that we have examined them and that it is our opinion the court did not err in refusing

said instructions. Many of them do not, in our judgment, state correct principles of law and others which may state correct principles of law are not applicable to the facts in this case.

It is next insisted by appellant that the verdict of the jury is against the manifest weight of the evidence. It is contended by appellant that there was no car in room 16 at the time appellee received his injury and that in as much as the whole theory of appellee's case as disclosed by his evidence is based on the presence of said car in said room at said time, that, therefore, if the manifest weight of the evidence discloses that no car was there at said time, that said cause should be reversed.

Plaintiff ~~Appellee~~ testified ~~to the~~ either ~~effect~~ that on the afternoon of the day in question he had loaded a car ~~with coal~~ in ~~said~~ room sixteen and that with the help of ~~two~~ other miners he rolled ~~said~~ the car back from the face ~~some twenty-five or~~ about thirty feet; that thereafter he lit the center shot and that while lighting the crosscut shot the exposed powder in the split of the fuse made a long flame and ~~flared across~~ his carbide lamp which he held in his hand and extinguished it; ~~that he was thereupon left in total darkness~~ Realizing ~~and~~ the ~~right to make a light by~~ striking matches that he carried in his pocket; but the ~~said matches~~ were damp and would not light; that knowing he was in danger he felt his way to the center of the room, ~~came in contact with~~ reached the track ~~with his feet~~ and proceeded rapidly eastward along the track and that forgetting ~~the presence of said~~ the car

forcibly collided with it, his face ~~and head~~ striking the coal on the same. The result ~~being~~, he was thrown backwark, fell to the ground and struck his head against the gob; that upon arising to his feet he became so confused, ~~bewildered and excited~~ he ~~was unable to know or~~ appreciate what he was doing or where he was going; that in his confusion he came in front of the center shot which exploded just at that time and destroyed the sight of both of his eyes.

The only evidence corroborating ~~appellee's~~ testimoney with reference to the car being in room ~~sixteen~~ is that of Pete Bogotta, a witness on behalf of ~~appellee~~ who testified that on the morning following ~~appellee's~~ injury at about five minutes to seven he went into said room ~~for the purpose of gathering up appellee's tools~~ and that there was a car on the track ~~in said room and had it hanging~~ ~~appellee's~~ check, on ~~the same~~. ~~On the other hand~~, Seven witnesses called by ~~appellant~~ testified that they were in room sixteen within an hour after appellee's injury and that no car of any character was in said room at said time. In addition to said seven witnesses the witnesses, Norton, Kneedler and Perry, assistant mine managers all testified they were in said room at about ten o'clock the following day and that there was no car in said room then. Nearly all of the seven witnesses who were in the room on the same day appellee was injured and shortly after said injury occurred testified that they went to said room for the very purpose of examining its condition and they are each and all definite in their statements that no car was there.

forcibly collided with it, his knee [illegible] crushing the coal on the car. The car in question, in the thirty [illegible] work, fell to the ground and struck [illegible] that upon orienting to his feet he became [illegible] what he was doing or where he was going; that [illegible] fusion he came in front of the center [illegible] just at that time and destroyed the [illegible] eyes.

[illegible] money with reference to the car being in [illegible] seen is that of Pete Coyotte, a witness on behalf of [illegible] testified that on the morning following [illegible] at about five minutes to seven he went into said room [illegible] of [illegible] and that there was a cage in the track in said [illegible] office's check, on the [illegible] room sixteen within an hour after [illegible] money and that no car of any description was in said room at said time. In addition to [illegible] they were in said room at noon the [illegible] day and that there was no car in said room then. Nearly all of the seven witnesses who were in the room on the same day appellee was injured and shortly after, said injury occurred testified that they went to said room [illegible] purpose of examining the condition and they [illegible] all defects in their respective [illegible].

Appellant further insists that the witness Goldsmith called by appellee corroborates its contention that not car was in room sixteen when appellee received his injuries. This witness testified he was in room sixteen on the morning following appellee's injury at about eight o'clock; that he saw the witness Rogatta there but did not see any car in said room. It is insisted by appellee that he is corroborated with reference to the presence of said car in said room sixteen at the time he received his injury by the witness Wm. Milietz, the driver in said entry. This witness testified on behalf of appellant that he pulled the last car out of appellee's room between one and two o'clock the day appellee received his injury and that he was not back any more that afternoon. On cross examination he testified that about seven o'clock the following morning he pulled a car of coal out of room fifteen and sixteen; that to his best recollection it was from room fifteen. He was then asked the question on cross examination if he had not stated in the presence of one Jose Johnson, John Tua and Pete Rogotta shortly after the accident that he took Pete's (appellee) car out of room fifteen or sixteen the next day after Pete was hurt. To this question he answered, "I don't remember". Afterwards, in rebuttal the witnesses above referred to testified that the witness Milietz had stated to them that to the best of his recollection the last car he took out of room sixteen was the morning after the injury.

The law is, that unless the verdict of the jury is against the manifest weight of the evidence the Appellate

Appellant further insists that the witness [illegible] car was in room sixteen when appellee received his injuries; [illegible] on the morning following appellee's injury at [illegible] of said car in said room sixteen at the time he received his injury by the witness Mr. Pilleto, the driver in said entry. This witness testified on behalf of appellant that he pulled the last car out of appellee's room between one and two o'clock the day appellee received his injury and [illegible] loving nothing he pulled a car of coal out of room fifteen and sixteen; that to his best recollection it was from room fifteen. He was then asked the question on cross examination if he had not stated in the presence of one John Johnson, John Lue and Pete Ingoglia shortly after the accident that he took Pete's (appellee) car out of room fifteen or sixteen the next day after Pete was hurt. To this question he answered, "I don't remember". Although, in rebuttal the witnesses above referred to testified that Mr. Pilleto Pelleto had stated to them that to the best of his recollection the last car he took out of room sixteen was the [illegible] car.

[illegible] against the manifest weight of the evidence and [illegible]

Court should not disturb the case, yet, where other errors intervene which may have affected the verdict, the court should much more readily set aside the verdict and remand the cause for another trial.

While we might not have disturbed the verdict had the record been clear of other errors, but in view of the erroneous rulings of the Court on the instructions as above set forth, we think this verdict should be set aside and a new trial granted.

Lastly, it is contended by appellant that the verdict of the jury is excessive. While the verdict is a large one, yet, taking into consideration the injury received by appellant, being the loss of the sight of both eyes, and at a time of life when it will be hard for him to take up a new line of employment, we would not be inclined to hold that the verdict was so excessive as to require a reversal on that ground. Appellant also insists that the trial court erred in the admission of certain evidence offered by appellee. This assignment of error was not argued by appellant in its brief and while we are inclined to think the court did err in its rulings on certain questions which it permitted witnesses on behalf of appellee to answer over objections, still we believe that what we have already said with reference to the law governing this case, will eliminate errors of that character on the re-trial of said cause.

For the reasons above set forth, the judgment of the trial court is reversed and the cause is remanded.

Reversed and remanded.

Not to be reported in full.

Court should not disturb the case, yet, where other errors intervene which may have vitiated the verdict, the court should much more readily set aside the verdict and remand the cause for another trial.

[illegible]

the record from other of court [illegible] the erroneous rulings of the court on the [illegible] set forth, we think this verdict should [illegible] new trial granted.

Lastly, it is contended by appellant that the verdict of the jury is excessive. While the verdict is a large one, yet, taking into consideration the injury received by appellant, being the loss of the right to both eyes, and at a time of life when it will be hard for him to find a new line of employment, we cannot [illegible] to hold that the verdict was so excessive as to [illegible] on that ground. Appellant also insists that [illegible] should be the rendition of judgment by the [illegible] peals. This contention is also [illegible] land in the court and allow the judgment to stand the court did err in the ruling [illegible] it committed reference on [illegible] subpoenas, [illegible] with reference to the law governing [illegible] amount of that character in the [illegible].

For the reasons above [illegible], the judgment of the trial court is affirmed and the cause is remanded.

[illegible]

not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 24 *day of April A. D. 1916.*

Clerk of the Appellate Court.

OPINION

e s .....

199 A 83

1581

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the -----17th----- *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Dolly Morgan, Administratrix of the Estate of James Morgan, deceased.

Appellee.

vs.

No. 81.

March Term, 1915

Carterville & Big Muddy Coal Co.

Appellant.

199 I.A. 83

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Williamson COUNTY

TRIAL JUDGE

HON. A. W. LEWIS.

Term No. 81. In the Appellate Court Agenda No. 36.

of Illinois, Fourth District.

March Term, A. D. 1915.

Dolly Morgan, Administratrix, Appellee	
vs.	Appeal from Williamson County Circuit Court.
Carterville and Big Muddy Coal Company, Appellant.	

Opinion by Boggs, J.

Appellee as administratrix of the estate of her deceased husband, recovered a judgment of $2,000.00 against appellant in the Circuit Court of Williamson County, in an action on the case, from which judgment this appeal is prosecuted.

The declaration contained three counts. The first count in substance charged that James Morgan, the deceased, was employed as a shot-firer in ~~appellant's~~ defendant's mine at Cambria, Illinois; that at the time he lost his life he was preparing to fire a shot; that it was the duty of ~~appellant~~ defendant to exercise reasonable care to furnish the deceased a reasonably safe place to do his work; that ~~appellant~~ defendant negligently and carelessly drove its thirteenth and fourteenth entry in said mine in a negligent and carless manner, in that it permitted the pillar between said entries near the face thereof to become so thin that a shot placed therein when fired

would as a natural consequence go through said pillar and injure or kill persons working on the opposite side thereof; that said deceased while in the exercise of ordinary care was killed as a result of said negligent act by a shot blowing through said pillar; that ~~appellant~~ defendant knew of the negligent and dangerous manner of driving said entry and narrowing said pillar and of the dangers to those working therein, or by the exercise of reasonable care could have known of said danger; that the deceased did not know of said dangerous condition, nor did he have equal means of knowing thereof with ~~appellant~~ defendant; that ~~appellant~~ defendant elected not to be governed by the Workmen's Compensation Act, approved June 10, 1911.

The second count charged practically the same facts as the first except that it did not allege that the deceased did not know of the thinness of the pillar and of the danger of working in said entry and it did not charge that the deceased did not have equal means with ~~appellant~~ defendant of knowing of said dangerous condition, and did not charge that deceased was in the exercise of reasonable care for his own safety, it alleging a rejection of the Workmen's Compensation Act, by ~~appellant~~ defendant.

The third count charged among other things that ~~appellant~~ defendant drove the thirteenth and fourteenth west entry of the main north in such a manner as permitted the pillar between them near the face thereof to become so thin that when a shot was placed therein and blasted, it would as a natural consequence go through said pillar and injure

would be a natural consequence of the act, with [illegible]
and injury of [illegible]

thereof; that said incorporated village in the [illegible]
many cows were killed as a result of said negligence [illegible]
a shot flowing through said pillar; that [illegible]
of the negligent and dangerous manner of erecting said
entry and narrowing said pillar and of the danger to [illegible]
[illegible], [illegible]
could have known of said danger; that the [illegible] did not
know of said dangerous condition, nor did [illegible]
of knowing thereof with reasonable [illegible]; that [illegible]
not to be governed by the [illegible] rule [illegible]
[illegible], [illegible].

The second count charged specifically the same [illegible]
as the first except that it does not allege that the [illegible]
did not know of the thickness or the pillar and of the danger
of working in said entry and it does not charge that the [illegible]
ceased and not have equal rights with [illegible] in [illegible]
[illegible], [illegible]
was in the exercise of reasonable care for [illegible]
it alleging a rejection of the [illegible]
by [illegible].

The third count charged [illegible]
[illegible] [illegible]
of the main north in such a manner as [illegible]
lar between them near the face thereof [illegible]
that when a shot was fired [illegible] and [illegible], it would
be a natural consequence to throw rock pillar and injure

persons working on the opposite side; that defendant knew of said condition and knew the danger of blasting shots therein or by the exercise of reasonable care could have known thereof; that while the deceased and another shot firer were working in said entry a shot ignited in the fourteenth entry, broke through said pillar in consequence of defendant's negligence in permitting said pillar to become too thin or narrow; and by reason thereof the deceased was struck and killed. The third count did not allege a rejection of the Workmen's Compensation Act.

This cause was originally appealed to the Supreme Court as it was contended by defendant that the Workmen's Compensation Act of 1911 was unconstitutional. The unconstitutionality of the act was practically conceded by appellee and that view of the act was taken by the trial court, and it instructed the jury especially that said act was unconstitutional. The supreme court, therefore, held that in as much as it was conceded by both parties that said act was unconstitutional that there was nothing for it to try and it therefore certified said cause to this court. See Morgan, Admrx. vs. Carterville and Big Muddy Coal Co. 264 Ill.533.

James Morgan, appellee's intestate, was 28 years old, at the time of hisinjury and had been working in coal mines thirteen years and was a practical, experienced shot firer. He had been acting as extra shot firer for the defendant for some time, but on the day he was killed he and one Thomas Hall, were employed as the regular shot

persons working on the opposite side. [illegible]
of said condition and knew the danger in leaving [illegible]
therein or by the exercise of reasonable care could have [illegible]
[illegible]
fourteenth entry hole through which [illegible]
of [illegible] negligence in constructing said mine [illegible]
become too thin or narrow; and by reason thereof the in-
cumbent was struck and killed. The third count was [illegible]
allege a violation of the Workmen's Act.

The cause was originally appealed in the Lawrence
County on it was continued by agreement into the Workmen's
Compensation Act of 1921 which was constitutional. [illegible]
constitutionality of the act was unconstitutionally [illegible]
[illegible]
court, and it instructed the jury especially that it could not
[illegible] unconstitutional. The supreme court, [illegible]
that in no event is it [illegible] by both [illegible]
not was unconstitutional that there was nothing for the
try and it therefore continued and came to this court.
Morgan, Admr. vs. Carbon Hill and Big Muddy Coal Co. 300
111.[illegible]

James Morgan, [illegible] administrator, [illegible]
old, at the time of his injury and had been working in
coal mines thirteen years and was a [illegible], [illegible]
shot firer. He had been working [illegible] for the
defendant for some time, and on the day [illegible]
and one Thomas Hall, were employed as the [illegible]

firers. The mine was divided into two districts; one side of the mine or one district was under the supervision of Hall, and the other was under the supervision of ~~Appellee's~~ plaintiff's intestate.

On the 15th day of March, 1913 ~~Appellee's~~ plaintiff's intestate and a Mr. Hall were on duty in ~~Appellant's~~ defendant's mine as shot firers; each made an inspection of the shots on his respective side of the mine; the 13th and 14th west entries off the main north entry were on Morgan's side of the mine, and it was, therefore, his duty to inspect the shots during the afternoon and before the men working in those entries had loaded the shots. The evidence showed that ~~Appellee's~~ plaintiff's intestate went into these entries during the afternoon and made an inspection of the shots that the entry men had drilled and loaded. Then the two shot firers got together and did the blasting. When they came to these two entries as they were on Morgan's side of the mine the shots therein had to be fired under Morgan's instructions. He accordingly instructed Hall where to find the two shots that were ready to shoot in the 14th entry, and he instructed him to go and fire them. When Hall left the cross cut where they had been standing for the purpose of carrying out his instructions and firing said shots, ~~Appellee's~~ plaintiff's intestate went to the face of the 13th entry, presumably for the purpose of firing the shot in the face of that entry. When he was near the face of the 13th entry, the shot Hall had lighted in the cross cut at the face of the 14th entry went off and blew through the pillar, blowing a large quantity of coal

fires. The mine was divided into two parts, left; one of the mine or one district was under [illegible] and the other was under the supervision of [illegible] beats.

On the 15th day of March, [illegible] tate and a Mr. Hall were on duty in [illegible] fires; each made an inspection of the [illegible] positive side of the mine; the 15th and [illegible] the main north entry were on [illegible] it was, therefore, his duty to inspect [illegible] afternoon and before the men working in [illegible] loaded the shots. The evidence [illegible] beats went into there certain [illegible] made an inspection of the entry that [illegible] drilled and loaded. Then the two shot [illegible] and did the blasting. When they came to the [illegible] as they were on Morgan's side of the [illegible] had to be fired under Morgan's instructions. [illegible] instructed Hall where to find the two [illegible] to shoot in the 15th entry, and he instructed [illegible] and fire them. When Hall left the [illegible] been standing for the purpose of carrying out [illegible] tions and writing said notes, [illegible] the face of the 15th entry [illegible] firing the shot in the face of that entry. [illegible] near the face of the 15th entry, the shot [illegible] in the cross cut of the face of the 15th [illegible] blew through the ceiling, blowing [illegible]

across the 13th entry and striking ~~appellee's~~ plaintiff's intestate, killing him instantly.

The 13th and 14th west entries were turned off the main north entry, and had been driven some 700 or 800 feet; the thickness of the pillar between these entries had averaged about 20 feet, but at the last open cross-cut between them, which was about 60 feet from the face of the entry at the time of the accident, the pillar between the two entries was 23 feet.

After leaving the last cross-cut on direction of the mine manager the entry man who was driving the 13th west entry turned it on an angle toward the 14th entry, until it had reached a thickness of from eight to ten and one half feet. The evidence showed that these entries are driven in pairs, and that the entry man who happens to be ahead, or in advance of the other one with his work, usually makes the cross-cut between the entries. It also appeared that the entry man driving the 13th entry had drilled a hole in the face of the 13th entry, and he had also made a cutting in the face of the 13th entry; and that the 14th entry man had also made cutting in the cross-cut toward the 13th entry. When the shot that was fired by Hall exploded, the force of it went toward the point of least resistance and blew through the pillar, knocking the rib of coal of the 13th entry loose and hurling it across the entry, striking ~~appellee's~~ plaintiff's intestate and killing him.

The grounds relied upon by ~~appellant~~ defendant for a reversal of this case ~~as stated in its brief~~ are, that the verdict ~~is~~ was

across the 12th entry and [illegible]

[illegible]

The 12th and 13th were [illegible]

main north entry, and [illegible]

the thickness of the [illegible]

averaged about 20 feet, but [illegible]

them, which was about 60 feet from the [illegible]

at the time of the accident, [illegible]

entries was 20 feet.

After leaving the last cross-cut [illegible] of

the mine manager the entry man who was driving the 13th [illegible]

entry turned it on an angle toward the 14th entry, until

it had reached a thickness of from eight to ten and one half

feet. The evidence shows that the entries are driven in

pairs, and the entry man who happens to be closest, or in an

[illegible] the cross-cut [illegible] cross-cut between the entries. It also appears that the

entry man driving the 13th entry had drilled a hole in the

face of the 13th entry, and he had then [illegible]

the face of the 13th entry; the 14th entry man had also been

cutting in the cross-cut toward the 13th entry. [illegible]

that was fired by [illegible] completed, the [illegible]

the point of least resistance and blew through the [illegible],

knocking the rib of coal of the 13th entry [illegible]

ing it across the entry, [illegible]

killing him.

[illegible] upon [illegible]

of this case [illegible]

against the manifest weight of the evidence; that the evidence did not tend to show negligence on the part of ~~appellant~~ defendant; that the deceased assumed the risk which resulted in his death; that the court erred in its rulings on the evidence and in giving of instructions on behalf of ~~appellee~~ plaintiff and in refusing instructions tendered by ~~appellant~~ defendant, and that ~~appellee's~~ counsel made prejudicial remarks to the jury in his argument.

The briefs that were submitted in this case were briefs that were prepared for the Supreme Court and a large part of the argument of appellant is devoted to the proposition that the trial court should have given a peremptory instruction to find the issues for appellant on the ground that there was no evidence tending to support the allegations of appellee's declaration, and to the proposition that the workmen's compensation act of 1911 was unconstitutional. Before this case was reached in the Supreme Court that court had decided that the workmen's compensation act of 1911 was constitutional. Diebeikis vs Link-Belt Co. 261 Ill. 484; Dietz vs Big Muddy Coal Co. 263 Ill. 486.

The cause was tried in the Circuit Court on the theory that ~~appellee~~ plaintiff must recover, if at all, on the ground that ~~appellant~~ defendant was guilty of common law negligence, resulting in an injury, which caused the death of ~~appellee's~~ plaintiff's intestate, and that ~~appellee~~ plaintiff was in the exercise of due care for his own safety at the time.

The instructions submitted by both sides required the jury to find that appellee's intestate was in the exer-

against the minimum weight of the evidence; that the jury could not stand on mere negligence on the part of defendant; that the deceased assumed the risk which resulted in his death; that the court erred in the ruling on the motions in arrest of judgment and for a new trial; [illegible] conceived made prejudicial according to the jury in the instrument.

The briefs that were submitted in [illegible] the new trial that were presented for the consideration and a [illegible] part of the argument of defendant [illegible] contention that the trial court should have given a [illegible] instruction to find the issues for defendant on the ground that there was no evidence tending to support the allegations of appellee's declaration, and to the [illegible] court had decided that the workmen's compensation act of 1911 was constitutional. Liebenthal v. Liebenthal, [illegible] 444; Dietz v. Big Muddy Coal Co., 265 Ill. 484.

The cause was tried in the circuit court on the theory that appellee must recover, if at all, on the ground that appellant was guilty of some [illegible] negligence, resulting in an injury, which caused the death of [illegible] [illegible], the [illegible] [illegible] case for his own safety at the time.

The instructions submitted by both sides required the jury to find that [illegible] defendant's [illegible] were in the exer-

cise of due care for his own safety; that the injury he received was not one of the assumed risks incident to his employment; that the unsafe condition of appellant's mine, on account of the narrowing of said pillar between the 13th and 14th entry, if found to constitute an unsafe condition, was not known to appellee and by the exercise of due care on his part would not have been known to him, and that said dangerous condition was known to appellant or by the exercise of due care could and would have been known by appellant. In other words, the court by its instructions gave to appellant the benefit of its common law defenses.

It is insisted by appellant that this cause should be reversed for the reason that the record fails to disclose that appellant was guilty of negligence which resulted in the death of appellee's intestate, and that its contention is supported by the following cases, Cooney v. Chicago-Springfield Coal Co., 143 App. 155; Stailey v. Illinois E. Coal Co. 156 Ill. App.119; Austin v. Majestic Coal & Coak Co. 179 Ill.App.525.

In none of said cases was the workmen's compensation act involved and therefore the mining companies were entitled to all of their common law defenses.

In Cooney v. Chicago-Springfield Coal Co; supra, the court held in that case that Cooney had assumed the risk of the employment and further that the evidence did not support his contention that the dangerous condition charged by him was not known to him prior to his injury. At page 160, the court says: "It is a rule that an employe of sufficient age and experience is chargeable with knowledge of the ordinary conditions under which the busi-

cise of due care for his own safety; that the injury he received was not one of the usual risks incident to his employment; that the unsafe condition of [illegible] on account of the narrowing [illegible] 13th and 14th county, [illegible] condition, was not known to [illegible] due care on his part could not have [illegible] that such dangerous condition was known [illegible] by the exercise of the care could not have been known by plaintiff. In other words, the courts by the instructions gave to plaintiff the benefit of the common law defense.

It is insisted by appellant that [illegible] reversed for the reason that the record [illegible] clear that appellant was guilty of negligence which [illegible] in the death of appellee's intestate, and that the contention is supported by the following cases: Conley v. Chicago-Springfield Coal Co., 142 App. 187; Conley v. Illinois Coal Co. 146 Ill. App. 188; [illegible]

In none of said cases was the [illegible] tion not involved and therefore the finding [illegible] sustained in [illegible]

In Conley [illegible] the court held in that case that Conley had [illegible] the risk of the employment and further [illegible] not support his contention in [illegible] charged by him was not known to [illegible] At page 188, the court says: "If [illegible] place of sufficient air and ventilated in [illegible] knowledge of the dangerous condition [illegible]

ness is conducted and its ordinary risks and hazards, and will be presumed to have assumed all such risks and hazards which to a person of his experience and understanding are, or ought to be, patent and obvious."

In Stailey v. Illinois M. Coal Co. supra, the court held that the verdict in that case was against the manifest weight of the evidence. In other words, that the administratrix who was suing for the death of her husband, had not supported the allegations of her declaration by the evidence. The court at page 122 says: "A careful examination and consideration of the evidence, which we shall not undertake to rehearse or discuss at length, impels us to the conclusion that the evidence was insufficient to warrant the jury in finding a dangerous condition, within the meaning of the statute, at the time Stailey and the other miners went down to work on the morning of the accident."

In Tustin v. Majestic Coal & Coke Co. supra, one of the questions involved was whether the Coal Co. was negligent in causing the pillar between certain entries in its mine to be so narrowed as to constitute an unsafe condition which resulted in injury to Tustin, a shot firer in said mine and as to whether the shot which caused the injury was a practical shot. On page 528 the court says "Appellee relies upon the alleged negligence of appellant in permitting room 4 to be turned out of the straight line towards the north and thereby causing the pillar of coal between the two rooms to become thinner than it otherwise would have been. It appears from the proofs, however, that the

[illegible] in examined and the preliminary rulings and decisions, and will be presumed to have resumed all such rulings and decisions which, to a [illegible] of the experience and [illegible] ing are, or ought to be, [illegible] and obvious.

In Bailey v. [illegible], [illegible], [illegible], [illegible] held that the verdict in that case [illegible] weight of the evidence. In other words, [illegible] tractrix who was suing for [illegible], and [illegible] supported the allegations of her declaration [illegible] dence. The court at page 150 says: "A carefully [illegible] and consideration of the evidence, which is [illegible] take to remarks or [illegible] at length, [illegible] clusion that the evidence was insufficient to warrant the jury in finding a dangerous condition, within the [illegible] of the statute, at the time Bailey and the other [illegible] were there as much on the invitation of the [illegible]."

In Tuetin v. Lafayette Coal & Coke Co., supra, one of the questions involved was whether the Coal Co. was negligent in causing the pillar between certain entries in its mine to be so narrowed as to constitute [illegible] tion which resulted in injury to Tuetin, a coal miner in said mine and as to whether the act which caused the injury was a proximal act. In page 126 the court says: "[illegible] relies upon the alleged negligence of [illegible] in [illegible] ting room X to be turned out of the [illegible] the north and thereby causing the [illegible] the two rooms to become narrower than it would [illegible] have been. It appears from the [illegible], [illegible] the

fact that the room turned to the north, was plainly apparent to those who entered it and went towards the face and that appellee, in the ordinary course of events, must have known it." We have quoted from these cases for the reason that appellant relies on these cases as supporting his contention that this judgment should be reversed on the ground that the verdict is against the manifest weight of the evidence. In our opinion the evidence in the record in this case clearly distinguishes this case from the cases cited. The clear preponderance of the evidence in this case discloses that entries 13 and 14 in appellant's mine had been driven some seven or eight hundred feet in practically a parallel line; that the average width of the pillar between said entries had been maintained at, at least twenty feet; that in the last cross cut the pillar between said entries at said point measured 23 feet; that after leaving said crosscut the 13th entry was turned in toward the 14th entry to the extent that at the point where the shot was fired which resulted in the death of appellee's intestate, the width of said pillar was only from eight to ten and one half feet; [It appeared that sights had been used in driving both of said entries up to the last cross cut and that sights were still used in driving the fourteenth entry, but that no sights were used in driving the thirteenth entry; that I.N. Roberts who drove the 13th entry said to Mr. Thomas, the mine manager, that he believed the pillar was getting too narrow between the 13th and 14th entry and on one or two

fact that the room turned to the north, was definitely
measured in those who entered it and went towards the
face and that opposite, in the ordinary course of events,
must have known it." He here quoted from Wigmore on
the reason that equivalent relief or the same or substan-
ing the contention that this judgment should be reversed
on the ground that the verdict is contrary to the
weight of the evidence. In our opinion the evidence in
[illegible]
cased cited. The plain preponderance of the evidence in
this case discloses that certain [illegible]
[illegible]
practically a parallel line; that the average width of the
alley between said entries had been ascertained to, at
least twenty feet; that in the last cross cut the alley
between said entries at said point measured 22 feet; that
after leaving said crosscut the 14th entry was turned in
toward the 14th entry to the extent that at the point where
the shot was fired which resulted in the death of deceased's
intestate, the width of said alley was only from eight to
ten and one half feet; that eight mules had been used in drawing
both of said entries up to the last crosscut and that eight
were still used in drawing the fourteenth entry, but that no
mules were used in drawing the thirteenth entry; that J.W.
Roberts who drove the 14th entry said to his mine manager, the
mine manager, that he believed the alley-way separating the
entry between the 13th and 14th entry and on our ear the

occasions he said to the mine manager that he could not run said entry on the old sights and that said mine manager said, he would put up sights but that he did not do so until after appellee's intestate was killed.

The evidence further disclosed that it ~~is~~ was not practical mining to drive said entries without sights and that there is no means by which the thickness of the pillars between the entries can be determined where such sights are not used. ~~The evidence further disclosed that~~ There were no lights in this part of the mine or in these entries and ~~that~~ the only lights that the shot firers had were the lamps on their caps. The clear preponderance of the evidence ~~further discloses that appellee's~~ intestate had no means of determining the thickness of the pillar at the face of the 13th and 14th entry at the time he received his injury; that this knowledge, however, was possessed by the mine manager or could and should have been known to him by the exercise of reasonable care to ascertain the same. We are of the opinion, therefore, that it was the duty of said mine manager under said circumstances to have advised said shot firers of said dangerous condition as they would have a right to presume that if these entries had been run some seven or eight hundred feet in a parallel line with an average thickness of at least twenty feet between said entries, that practically the same thickness of said pillar would be continued. In our judgment the evidence warranted the jury in finding that the proximate cause of the injury to appellee's intestate which resulted in his death was the

negligent act of appellant in causing or permitting the pillar between the 13th and 14th entries to be narrowed from twenty-three feet in thickness at the last cross cut to from eight to ten and one half feet, at the place in injury without having notified said shot firers of such dangerous condition.

The evidence further discloses that the shot which resulted in the death of appellee's intestate was a practical shot and that question was submitted squarely to the jury by the instructions of the court.

It is not necessary for us to determine whether or not in deciding this case we should take into consideration the fact that the record discloses that the appellant had elected not to be governed by the Workmen's Compensation Act, as in our judgment the preponderance of the evidence is to the effect that appellee's intestate was not guilty of contributory negligence, and that his injury was not the result of an assumed risk incident to his employment, and also, that his injury was not occasioned by the negligent act of a fellow servant, but that the approximate cause of his death was the negligence of appellant as above set forth.

Complaint is made by appellant that the court erred in instructing the jury. Appellant insists that the court erred in giving certain instructions on behalf of appellee and in refusing certain instructions offered on behalf of appellant. We have examined these instructions and while certain of the instructions given on behalf of appellee are

negligent act of omission in causing or contributing to the injury complained of. [illegible] Upon [illegible] the right to sue and use that [illegible] without having [illegible] and [illegible] [illegible].

The evidence further discloses that [illegible] resulted in the death of appellee's intestate [illegible] tical act and that question was submitted [illegible] jury by the instructions of the court.

It is not necessary for us to determine whether or not in avoiding this case [illegible] the fact that the record discloses that the [illegible] chosen not to be governed by the Workmen's Compensation Act, as in our judgment the preponderance of the evidence is to the effect that [illegible]'s intestate was not guilty of contributory negligence, and that his injury was not [illegible] and also, that his injury was not occasioned by the negligent act of a fellow servant, but that the proximate cause of his death was the negligence of appellant [illegible] and [illegible].

Complaint is made by appellant that the court erred in instructing the jury. Appellee contends that the court erred in giving certain instructions on behalf of appellee and in refusing certain instructions requested on behalf of appellant. We have carefully [illegible] and find certain of the instructions given on behalf [illegible]

not free from criticism, still said instructions do not direct a verdict and taken in connection with the instructions given on behalf of appellant, we think fairly presented to the jury appellant's theory of the case. In reference to the instructions offered by appellant and which were refused by the court will say that so far as said instructions present correct principles of law, the same were covered by other instructions given on appellant's behalf. The fact is, the instructions taken as a whole were more favorable to appellant's theory of the case than it was entitled to under the law.

There was no reversible error on the part of the court in its rulings on the evidence as disclosed by the record.

In reference to the contention made by appellant that appellee's counsel made prejudicial remarks to the jury in his closing argument, will say that we do not think the remarks were of such a character as should cause a reversal of the case. In fact, appellant in its argument practically concedes that it is not seriously insisting on this assignment of error.

The verdict in this case was not excessive and we think on the facts disclosed by the record it should be affirmed.

Judgment affirmed.

Not to be reported in full.

not free from criticism, still said instructions do not direct a verdict and taken in connection with the instructions given on behalf of appellant, in which liberty was given to the jury as against appellant's theory of the case. In addition to the instructions offered by appellant and refused by the court will say that to use as some instructions present correct principles of law, the same can be covered by other instructions given on appellant's behalf. The fact is, the instructions taken as a whole were favorable to appellant's theory of the case when it was entitled to under the law.

There was no reversible error on the part of the court in its rulings on the evidence as discussed by the parties.

In reference to the contention made by appellant that appellee's counsel made prejudicial remarks to the jury in his closing argument, will say that we do not think the remarks were of such a character as would cause a reversal of the case. In fact, stand out in the record practically conceded that it is not certainly inducting on this testimony of error.

The verdict in this case was not conclusive and we think on the facts disclosed by the record it should be affirmed.

Judgment affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 24th *day of April A. D. 1916.*

Clerk of the Appellate Court.

OPINION

s .....

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the -----17th----- *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Aquilla I. Brown,

Appellee.

vs.

No. 6.

October Term, 1915

J. L. Loudy, Walter Satiea, A. G. Rinehart and Charles Gauldoni,

Appellants.

199 I.A. 85

ERROR TO
APPEAL FROM

Circuit COURT

Franklin COUNTY

TRIAL JUDGE

HON. W. H. GREEN.

Term No. 6 | In the Appellate Court of Illinois, Fourth District. October Term, A. D. 1915. | Agenda No. 15.

Acquilla I. Brown, Appellee

vs.

J. E. Moudy, Walter Satcia, A. C. Rinehart and Charles Gualdoni,

Appeal from the Circuit Court of Franklin County.

Opinion By Boggs, J.

This was an action on the case under Section 9 of the Dram Shop Act brought by appellee against appellants at the May Term, 1914, of the Circuit Court of Franklin County. The declaration as originally filed consisted of five counts. The first three counts of said declaration in substance charged that the defendant sold intoxicating liquor to appellee's husband which caused him to be and remain habitually intoxicated and that as a consequence of such intoxication he neglected his business, idled away his time, spent and consumed his money for intoxicating liquors bought of appellants, whereby appellee was injured in her means of support. A demurrer was sustained to the fourth and fifth counts of said declaration, and a plea of the general issue was filed to the remaining counts. Four different trials were had. On the first trial the jury returned a verdict in favor of appellee for $750.00. On the second trial the jury returned a verdict in favor of appellee for One Dollar. The third trial resulted in a hung jury and in the fourth trial, which was had at the February Term, 1915, the jury returned a verdict in favor of appellee for Eleven Hundred

Term No. 8.

In the Appellate Court
of Illinois, Fourth District.
October Term, A. D. 1916.

Acquilla I. Brown, Appellee	
vs.	Appeal from the
J. E. Duncy, Walter Dobbs, A. C. Hinchart and Charles Hollomon,	Circuit Court of Franklin County.

Opinion filed June, 1.

This was an action of the case commenced by the of the Term Step Lot brought by appellee against appellants at the May Term, 1914, of the Circuit Court of Franklin County. The declaration as originally filed consisted of five counts. The first three counts of said declaration in substance charged that the defendant sold intoxicating liquor to appellee's husband which caused him to be and remain habitually intoxicated and that as a consequence of such intoxication he neglected his business, failed away [illegible], [illegible] and [illegible] his [illegible] for intoxicating liquor [illegible] or [illegible], thereby rendering [illegible] [illegible] [illegible]. A demurrer was sustained to the fourth and fifth counts of said declaration, and a [illegible] of the remaining three was filed to the remaining counts. Four different trials were had. In the first trial the jury returned a verdict in favor of appellee for $[illegible]. In the second trial the jury returned a verdict in favor of appellee for the [illegible]. The third trial resulted in a hung jury and in the fourth trial, which was had at the February Term, 1915, the jury

dollars. The suit was dismissed as to appellant, J. M. Moudy and judgment was rendered on the verdict against appellants, Sateia, Rinehart and Gualdoni, from which judgment this appeal is prosecuted.

~~The evidence discloses that appellee's~~ Plaintiff's husband with his family moved to the town of Sesser in Franklin County, about the month of September, 1908 and ~~that~~ at that time he was about fifty years of age; ~~that~~ Prior to moving thereto, ~~appellee's husband~~ he was a school teacher and farmer, but had never accumulated any property to speak of. He had had a good deal of sickness in his family which involved a considerable expense for a man of his means. Prior to his moving to Sesser ~~the evidence discloses that appellee's husband~~ he was a man of good habits, steady and industrious and had furnished his family a comfortable support. About the month of March, 1909, after moving to Sesser, ~~Appellee's~~ plaintiff's husband, with his son, Raymond Brown, engaged in the butcher business until February 20, 1911. Their bank account introduced in evidence shows that their business was reasonably prosperous and that during the period of two years it amounted to more than $25,000. On February 20, 1911, ~~appellee's~~ plaintiff's husband bought out his son's interest in the business and ran the business alone until about October 1, 1911, when the son, bought out his father.

~~The evidence further discloses that~~ It further appeared that sometime after engaging in the butcher business, ~~appellee's~~ plaintiff's husband began the use of intoxicating liquors; that he purchased said liquors of ~~appellants~~ defendants and that the habit of drinking grew on him until it affected him to the extent

dollars. The suit was [illegible], a jury and judgment was rendered on the verdict against [illegible], appellants, Linehart and Goddard, from which judgment this appeal is prosecuted.

The evidence discloses that appellee's [illegible] with his family moved to the town of Denver in [illegible] County, about the month of September, 1903 and that at that time he was about fifty years of age; that prior to [illegible] [illegible], [illegible] [illegible], but had never accumulated any property to speak of. He had a good deal of sickness in his family which involved a considerable expense for a man of his means. Prior to his moving to Denver the evidence discloses that appellee's [illegible] [illegible], [illegible] and [illegible] his family [illegible]. [illegible] the month of March, 1903, after moving to Denver, appellee's husband, with his son, Raymond [illegible], engaged in the [illegible] business [illegible], 1903. [illegible] in [illegible] [illegible] prosperous and that during the period of two years his [illegible] [illegible], [illegible], [illegible] husband bought out his son's interest in the business and ran the business alone until about October 1, 1905, [illegible], bought out his father.

The evidence further discloses that [illegible] after engaging in [illegible], [illegible] husband began the use of intoxicating liquors; that he increased said liquors of [illegible] and [illegible] drinking grew on him until it affected him [illegible]

that he neglected his business and was frequently intoxicated to such an extent that he had to be assisted home. ~~The evidence also discloses~~ It also appeared that the trips to the saloon of ~~appellants~~ defendants were of frequent daily occurrences and that at times it would be necessary for those in charge of the shop to go to the saloon for the purpose of bringing ~~appellee's~~ plaintiff's husband back to the shop to look after his business; that the butcher business conducted by ~~appellee's~~ plaintiff's husband ran down and that finally he closed the same out and soon disposed of the funds derived therefrom, amounting to something like $1200.00.

~~The evidence further discloses~~ It further appeared that in a fit of intoxication ~~appellee's~~ plaintiff's husband, shot and killed a man and was incarcerated in the County jail for several months awaiting his trial. ~~Appellee sought to recover damages for specific intoxication but under the ruling of the court she abandoned the same on the trial.~~

Numerous errors have been assigned on the record, but in the argument, appellants abandoned all of the errors assigned except two, viz: that the verdict of the jury is against the manifest weight of the evidence and that the court erred in the giving of instructions on behalf of appellee and in modifying one of the instructions tendered by appellant. Errors assigned but not referred to in the argument under the rules of this court are considered abandoned.

Appellants contend that the evidence is wholly insufficient to support the verdict. They refer to the fact that appellee's husband had never been able to accumulate any considerable property prior to coming to Sesser, and draw the conclusion that the intoxication caused by the

that he neglected his business and was generally intoxicated to such an extent that he had to be nursed [illegible]. The evidence also disclosed that the debts in the saloon of appellants were of frequent daily occurrence and that at times it would be necessary for three or four of [illegible] to go to the saloon for the purpose of bringing appellee's husband back to the shop. The proof further shows that the butcher business conducted by appellee's husband ran down and that finally he closed the shop and was disposed of the funds derived therefrom, amounting to something like $1500.00.

The evidence further disclosed that in a fit of intoxication [illegible] induced, shot and killed a man and was incarcerated in the County jail for several months awaiting his trial. [illegible] but under the ruling of the court she dismissed the same on the trial.

Numerous errors have been assigned on the record, but in the argument, appellants abandoned all of them assigned except two, viz: that the verdict of the jury is against the manifest weight of the evidence and that the court erred in the giving of instructions on behalf of appellee and in modifying one of the instructions offered by appellant. Errors assigned but not referred to in the argument under the rules of this court are deemed to be waived.

Appellants contend that the evidence [illegible] that appellee's [illegible] any considerable amount [illegible] from the [illegible]

liquors sold by appellants cannot be said to have rendered her said husband incompetent to support his family. In fact, this is the basis of appellant's contention that the verdict of the jury is against the manifest weight of the evidence. Appellants further insist that the bank account of appellee's husband showing the business transacted by him while engaged as a butcher goes to show that his earning capacity as a business man was not injured on account of the alleged intoxication from the liquors sold by appellants. We do not think that the line of reasoning of appellants is sound as the evidence discloses that appellee's husband had a family consisting of himself, wife and several children and that prior to coming to Sesser his wife had been sick with rheumatism for eight months and that in having her treated he incurred expenses amounting to some six or eight hundred dollars; that one of his daughters was confined in a hospital for several months with a disease of the spine and that appellee's husband spent several hundred dollars in having her treated. This evidence tends to show why appellee's husband had no funds at the time he came to Sesser. Then, too, if the evidence tends to prove, as we think it does, that appellee's husband had a prosperous business as a butcher in Sesser and was making money which he was using for the support of appellee and the rest of his family, and that as a result of the habit of becoming intoxicated his business fell off and ~~th~~ that finally said habit grew on him to such an extent that he abandoned his business it cannot be said that appellee was not injured in her means of support by reason thereof.

Under the law of this State the wife is injured in her means of support when her husband's ability to furnish her with the comforts of life is lessened or destroyed,

although she may not be deprived of the bare necessities of life. Maloney v. Daily, 67 App.427; McMahon v. Sankey, 133 Ill.636; Horn v. Smith, 77 Ill.381. Heidel v. Anthis, 71 Ill.246.

It is also the law of this state that the legal obligation on the part of the husband to support his wife is not limited to supplying the bare necessities of life, but it includes the comforts of life as well, and whatever is suitable to her situation and the husband's condition. McMahon v. Sankey, supra; Hackett v. Smelsley, 77 Ill.109.

The evidence in this case is abundant to the effect that appellee's husband drank liquor to excess while at Sesser, and that he acquired these liquores from appellants, and that intoxication resulted therefrom, and that said intoxication caused him to neglect his business and at times rendered him incapacitated to the extent that he had to be assisted home. Appellants do not deny selling liquors to appellee's husband, and in fact, there is practically no evidence to dispute or contradict the evidence of appellee on this question, so we feel that the jury were warranted in returning this verdict and that it is not against the weight of the evidence. No question is raised in the argument that the verdict is excessive.

The next contention is that the court erred in instructing the jury on behalf of appellee. Appellants contend that the first instruction is erroneous for the reason it authorized the jury, in estimating appellee's damages, if they find for appellee, to take into consideration the extent which appellee's husband neglected his business and

the amount of money and property squandered by him if proven in consequence of such intoxication so far as the evidence may enlighten the jury. Appellants insist that this instruction is erroneous for the reason that there was no evidence to base the instruction on. As above stated there is plenty of evidence in the record to the effect that appellee's husband squandered and wasted his money. It was, therefore, not error to give said instruction.

Appellants criticise the second instruction given on behalf of appellee for the reason that it assumes that the alleged sales or gifts of intoxicating liquors constitute the cause of action, instead of the intoxication caused by the same. We have examined this instruction and we do not find it subject to the criticism made, as the instruction is limited in its effect to any liquors which may have caused intoxication.

Instructions numbers three and six are complained of by appellant for the reason that they inform the jury that under the law of this State any selling or giving of intoxicating liquor to a person in an intoxicated condition may be regarded as wilfully and wantonly made. Neither of these instructions directs a verdict and in our opinion the giving of the same was not erroneous, as there was evidence to support these instructions in the record.

Instruction number five is objected to for the reason that it is claimed it is not based on the evidence in the case. What we have already said with regard to instruction number one given on behalf of appellee applies with equal force to the objection made to this instruction, and is a complete answer to the same.

The court gave the following instruction for plaintiff: The court ~~instructs the jury~~

~~Instruction number ten is as follows:~~ "In order to sustain her action under these statutes for injury to her means of support, it is by no means necessary she (the wife) should show that she has actually been without support, or been at any time, in whole or in part, deprived of means of support. Means of support relate to the future as well as to the present. It is enough that she show that the sources of her future support have been cut off or diminished below what is reasonable and competent for a person in her station in life, and below what they otherwise would have been." The complaint made to this instruction is that it refers to injury to the future support of appellee as well as to the damages already suffered by her, and it is contended that the only damages appellee can recover for, are the damages that she sustained up to the time of the bringing of the suit.

In the case of McMahon v. Sankey, supra, at page 644, the court says, (quoting from Mulford v. Clewell 21 Ohio State, 191) "Means of support relate to the future as well as the present. It is enough that she show that the sources of her future support have been cut off, or diminished below what is reasonable and competent for a person in her station in life and below what they otherwise would have been." In the case of Meidel v. Anthis 71 Ill.241. it was shown that the husband was a farmer, and it was there held, that, if his capacity to cultivate land was sensibly diminished by the act of the defendant, the wife was injured in her means of support. And, in this case, if the evidence discloses, as we think it does, that the ability of appellee's husband to earn a livlihood for appellee has been lessened by the intoxication caused by liquors sold by appellants, it affects her future support for which she would have a right of recovery.

The objections to instructions eleven, thirteen

[illegible]

to question her position under these statutes for failing to have means of support, it is by no means necessary that [illegible] been at any time, in fact, in [illegible] support. Lack of support relate to the future as well as to the present. It is enough that the [illegible] her future support have been cut off or [illegible] is reasonable and competent for a person in her position in life, and below what they otherwise would have been. The complaint made to this instruction is that it serves to induce to the future support of specifics as well as to the damages already suffered by her, and it is contended that the only [illegible] measured up to the time of the bringing of the suit.

In the case of Lehman v. Lehman, supra, [illegible] 644, the court says, (quoting from [illegible] v. [illegible] 7 Ohio [illegible], 181) "Lack of support relates to the future as well as the present. It is enough that the [illegible] of her future support have been cut off, or diminished [illegible] when is reasonable and competent for a person in her position in life and below what they otherwise would have been. In the case of Lehman v. Mehlie 72 N.W. 641. [illegible] that the husband was a farmer, and it was [illegible] that, if his capacity to cultivate land was [illegible] by the act of the defendant, [illegible] support. And, in this case, if the [illegible] we think it does, that the [illegible] been a likelihood or expectation [illegible] by the defendant caused by it more and by [illegible] her future support for which [illegible] recovery.

The objections to instructions eleven, thirteen

and fourteen given on behalf of appellee, we think, are without merit, and we do not believe that it was error to give said instructions. It is also insisted that the modification made in instruction number twelve offered on behalf of appellants, which modification consisted in adding these words, "and it did not affect her future support" constituted error. What we have said with reference to instruction number ten given on behalf of appellee covers the objection made to the modification of instruction number twelve offered on behalf of appellant.

While the instructions given on behalf of appellee are not as carefully drawn as they should have been, yet, taken as a whole, with the instruction offered by appellants, we believe that they fairly presented to the jury the law governing cases of this character.

Finding no reversible error in this record the judgment of the Circuit Court will be affirmed.

Judgment affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 24th *day of April A. D. 1916.*

Clerk of the Appellate Court.

PINION

s

199 I.A. 90

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the Seventeenth *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

199 I.A. 90

William Neeley,

Appellee.

vs.

No. 11.

October Term, 1915

The Metropolitan Life Insurance Company,

Appellant.

ERROR TO
APPEAL FROM

City COURT

of East St. Louis COUNTY

TRIAL JUDGE

HON. ROBERT H. FLANNIGAN.

Term No. 11. In the Appellate Court Agenda No.3.

of Illinois, Fourth District.

October Term, 1915.

William Neeley, Appellee vs. The Metropolitan Life Insurance Company, Appellant.	Appeal from the City Court of East St. Louis, Illinois.

Opinion by Boggs, J.

This was an action in assumpsit brought by appellee against appellant in the City Court of East St. Louis, to recover on a Life Insurance Policy for the death of Annie Neeley, daughter of appellee. A trial was had which resulted in a verdict and judgment in favor of appellee for $103.00, and costs, from which judgment this appeal is prosecuted.

Appellee is a colored man living in East St.Louis. Annie Neeley, his daughter who was then about thirteen years of age, was insured by appellant on July 27, 1914, for $206.00.She died November 6, 1914 of acute tubercular trouble. Appellee was the beneficiary and the policy being for less than $500. no medical examination was required. Certain questions, however, had to be answered by appellee who signed the application, and the contention on the part of appellant is that the answers given were not true.

The declaration consisted of a single count in the usual form declaraing on said policy of insurance, to which

Term No. 11. In the Appellate Court

of Illinois, Fourth District.

October Term, 1916.

[illegible]

vs.

The Metropolitan Life

Insurance Company,

Appellee.

Appeal from the City Court of

East St. Louis, Illinois.

[illegible]

This was an action in assumpsit brought by appellee against appellant in the City Court of East St. Louis, to recover on a life insurance policy for the death of Annie Seley, daughter of appellee. A trial was had which resulted in a verdict and judgment in favor of appellee for $1[illegible].00, and costs, from which judgment this appeal is prosecuted.

Appellee is a colored man living in East St. Louis. Annie Seley, his daughter who was then about thirteen years of age, was insured by appellant on July 27, 1914, for $[illegible].00. She died November 4, 1914 of acute tuberculosis of the lungs. Appellee was the beneficiary and the policy was for less than $[illegible]. Numerous exceptions were taken. Certain questions, however, had to be considered in order that we may reach the conclusion, and the contention on the part of appellant is that the verdict given was not true.

The declaration consisted of a single count in the usual form declaring on said policy of insurance, in which

count the appellant in addition to the general issue filed four special pleas.

Under the second, third and fourth special pleas the following issues were raised :- first, whether prior to insured's application she had been treated by physicians for a serious disease; second, whether insured had been afflicted prior to the issuance of said policy with bronchitis, or pulmonary diseases; and third, whether in said application it had been stated by appellee that the insured had not been attended by a physician within two years for a serious complaint.

Appellant contends that the judgment of the trial court should be reversed, first, because the verdict of the jury is against the evidence, second, because the court erred in permitting the wife of appellee to testify, and third, because of error in the giving of instructions on the part of appellee and in the refusal of instructions offered by appellant.

Appellee's daughter, the insured, died with acute tubercular trouble and the question is whether she was suffering with this disease at the time said policy was issued, and if she were, and if appellee made false statements in reference thereto, then under the authorities he was not entitled to recover. Nyman v. The Manufactuers & Merchants Life Association, 262 Ill300; National Union v. Armhorst, 74 Ill.App.482; Davis v. Catholic Order of Foresters, 165 Ill.137.

The evidence as to whether the insured had suffered with bronchial or pulmonary trouble before said policy was

count the appellant in addition to the general term, filed four special pleas.

Under the second, third and fourth special pleas the following issues were raised :- first, [illegible] to insured's application was not [illegible] for a serious disease; second, whether insured [illegible] violated prior to the issuance of said policy [illegible] pulmonary disease; and third, whether in [illegible] it had been stated by appellee that the insured had not been [illegible] within the previous [illegible] months.

Appellant contends that the judgment of the trial court should be reversed, first, because the verdict of the jury is against the evidence, second, because the court erred in permitting the wife of appellee to testify, and third, because of error in the giving of instructions on the part of appellee and in the refusal of instructions offered by appellant.

Appellee's daughter, the insured, died with acute [illegible] and the question is whether she had [illegible] wrongly with that disease at the time said policy was issued, and if she were, and if appellee made false statements in reference thereto, then under the authorities he was not entitled to recover. Ayman v. The Imperial Life Insurance Co., [illegible]; National Union v. Arnold, [illegible]; Life Association v. [illegible], 165 Ill.127.

The evidence as to whether the insured was suffering with tuberculosis or simply from [illegible]

issued or as to whether she had been treated by a physician for a serious disease within two years prior to the issuance of said policy was conflicting, but in as much as this cause will have to be reversed for errors in said record hereafter mentioned, we are expressing no opinion on the weight of the evidence.

The wife of appellee was allowed to testify in said cause on behalf of appellee over the objection of appellant. This was error as under Section Five of Chapter Fifty-one of Hurd's Revised Statutes, appellee's wife was an incompetent witness. Donnan v. Donnan, 236 Ill.341; Scheareffler v. Chase, 245 Ill. 400.

It is next contended by appellant that the court erred in refusing instructions numbers one and two of appellant's refused instructions. Instruction Number One, so far as the same was important was covered by other instruction given on its behalf, and there was no error in its refusal. Appellant's instruction number two was to the effect that if the jury believe from the evidence that appellee had wilfully sworn falsely on said trial as to any matter or thing material to the issues in the cause, then the jury were at liberty to disregard his entire testimony, except so far as the same might be corroborated by other credible evidence, or by the facts and circumstances proven on the trial. This instruction we think was proper and should have been given and as there was no instruction given by the court covering this point, it was error in the court to refuse it. West Chicago Street Railroad Co. v. Dougherty,

issued or as to whether she had been treated by a physician for a serious disease within two years prior to the issuance of said policy was conflicting,) but in as much as this cause [illegible] mentioned, we are expressing no opinion on the weight of the evidence.

The wife of appellee was allowed to testify in said cause on behalf of appellee over the objection of appellant. [illegible] an incompetent witness. [illegible] Scherffler v. Chase, 266 Ill. 460.

It is next contended by appellant that the court [illegible] tion given on its behalf, and there is no error in its refusal. Appellant's instruction number two was to the effect that if the jury believe from the evidence that [illegible] wilfully sworn falsely on said trial as to any matter or thing material to the issues in the case, then the jury were at liberty to disregard his entire testimony, except so far as the same might be corroborated by other credible evidence, or by the facts and circumstances proven on the trial. This instruction we think was proper and should have been given and as there was no instruction given by the court covering this point, it was error for the court to refuse it. [illegible]

170 Ill.379; C. & E.I.R.R.Co. v. Burridge, 211 Ill.9.

In the case of C. & E.I.R.R.Co. v. Burridge, supra, it was held by the court, that if both parties to said suit had been natural persons, that then the instruction should have been so drafted as to apply to either party, but that where one of the parties to the proceeding is a natural person and the other is a corporation, it is proper in the instruction to direct the attention of the jury to the testimony of the natural person, and that is what was done in this instance.

For the errors committed by the court in permitting the wife of appellee to testify and for the refusal to give appellant's instruction number two, this cause is reversed and remanded.

Reversed and remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 24th *day of April A. D. 1916.*

Clerk of the Appellate Court.

PINION

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the Seventeenth *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

The People, ex rel, Lou Stucker,
Appellee.

vs.

No. 13.

October Term, 1915

Lacey Kirby,
Appellant.

~~ERROR TO~~
APPEAL FROM

County COURT

Saline COUNTY

TRIAL JUDGE

HON. C. D. STILWELL.

Term No. 13. In the Appellate Court Agenda No.36.

Of Illinois, Fourth District.

October Term, A. D. 1915.

The People of the State of Illinois for the use of Lou Stucker, Appellee. vs. Lacey Kirby, Appellant.	Appeal from the County Court of Saline County.

Opinion by Boggs, J.

Suit was instituted in the County Court of Saline County in the name of the People for the use of Lou Stucker, hereinafter designated as the prosecuting witness, charging appellant with being the father of her bastard child. The trial resulted in a verdict and judgment against appellant. From that judgment this appeal is prosecuted.

It is conceded that the prosecuting witness is an unmarried woman; and that the child in question is a bastard and was born on the 29th day of January, 1915.

Appellant relies on the following grounds for a reversal of said cause, first, that the county court of Saline County had no jurisdiction to try said cause; second, that the court erred in its rulings on the admission of evidence, and third, that the court erred in its instructions to the jury.

It is contended by appellant that the county court of Saline County had no jurisdiction of this proceeding for

Term No. 16. In the Appellate Court Number No.20.
of Illinois, Fourth District.
October Term, A. D. 1916.

The People of the State of Illinois for the use of Iron Stocker,	Appeal from the County Court of Bureau County.
vs.	
Tony Lisko,	
Appellant.	

Opinion by Boggs, J.

Suit was instituted in the County Court of Bureau County in the name of the People for the use of Iron Stocker, hereinafter referred to as the prosecuting witness, charging appellant with being the father of her bastard child. The usual proceeding in a vexatious and indirect appellant, from that judgment this appeal is prosecuted.

It is conceded that the prosecuting witness is an unmarried woman; and that the child in question is a bastard and was born on the 29th day of January, 1916.

Appellant relies on the following grounds for a reversal of said order, viz., that the county court of Bureau County had no jurisdiction to try said cause; that the court erred in its rulings on the admission of evidence, and that the court erred in its instructions to the jury.

It is contended by appellant that the county court of Bureau County had no jurisdiction of this proceeding for

the reason that the prosecuting witness gave birth to the child in question at the home of her father who resided in Lope County. Section 1, Chapter 17, Hurd's Revised Statutes, provides that "when an unmarried woman who shall be pregnant or delivered of a child which by law would be deemed a bastard shall make complaint to a Justice of the Peace, or Judge of a municipal Court in the County where she may be so pregnant or delivered, or the person accused may be found, and shall accuse, under oath or affirmation, a person with being the father of such child, it shall be the duty of such Justice or Judge to issue a warrant against the person so accused and cause him to be brought forthwith before him, or in his absence, any other justice of the peace or judge in such county." The evidence is to the effect that the act of intercourse, which appellee claims resulted in the conception of said child, took place in Saline County. The record also discloses that appellant was found and served in Saline County, which brings the case squarely within the statute and shows conclusively that the county court of Saline County had jurisdiction.

Second, appellant contends that the court erred in excluding proper evidence offered by him on the trial of said cause. The complaint being that the Court unduly limited the examination of a witness Burke called by ~~appellant~~ defendant. ~~This witness~~ testified that he had had intercourse with appellee, the first occasion being about the middle of May 1914, some five or six days subsequent to the day on which the prosecuting witness testified that she had intercourse with appellant. He was asked as to other alleged acts of

intercourse with said witness to which questions objections were made by appellee and were sustained by the Court. The record shows that the objection to these questions was sustained for the reason that the questions did not limit the time to the period of gestation. ~~The record, however, discloses that~~ Later in the trial the court permitted a full examination of this witness as to other acts of intercourse with appellee had at any time during the months of May and June, ~~which we think was all that appellant was entitled to.~~ The child was born on the 29th day of January, 1915. The 29th of June, 1914, would be just seven months preceding the birth of the child. There was nothing in the evidence to show that this child was not a fully developed child, and we do not feel that appellant was unnecessarily limited as to acts of intercourse had by others with the prosecuting witness.

Appellant also complains that the court limited the cross examination of the prosecuting witness too strictly. On an examination of the record we do not find the court erred in this respect.

Appellant argues that the period of gestation is from two hundred and sixty to three hundred and eight days from coition and cites medical and legal authorities in support thereof. If the period of gestation as laid down by appellant be taken as correct, then the court clearly did not err in its rulings on the evidence as it allowed a much broader examination as to time than would be covered by the period contended for by appellant. After a careful examination of this record we do not believe that the court committed any serious error in its rulings on the evidence.

[illegible]

Lastly, appellant insists that the court erred in giving the second, third, seventh and eleventh instructions given on behalf of appellee. The second instruction informs the jury that in considering the weight to be given to the testimony of the prosecuting witness they should take into consideration so far as the same is shown by the evidence, her condition immediately before and at the time of the act of intercourse, which caused conception. Appellant contends that the court assumed as a fact the alleged act of intercourse testified to by said prosecuting witness as having been had with appellant, instead of submitting the same to the jury. There is some force in appellant's criticism but we do not believe that the jury were misled by this instruction, for the court in the same instruction requires the jury before finding appellant guilty, to find from the facts and circumstances that he was the father of said child.

Complaint is made as to the third instruction for the reason that the court informed the jury that the prosecuting witness was not a party to the suit. We do not think that the court should have given an instruction to the jury on this question, but we do not consider the giving of the same as serious error.

Appellant complains of the seventh instruction for the reason that it informs the jury that in determining the weight that they should give to the testimony of appellant they shall take into consideration his interest in the result of the suit, his demeanor while on the stand, his conduct at the trial so far as the same is disclosed by the evidence. The part of the instruction objected to by appel-

Lastly, appellant insists that the court erred in giving the second, third, tenth and eleventh instructions given on behalf of appellee. The second instruction informed the jury that in considering the weight to be given to the testimony of the [illegible] [illegible] [illegible] [illegible] [illegible] the condition immediately before and at the time of the act of intercourse, which caused conception. [illegible] [illegible] based on a fact, the alleged act of intercourse testified to by said prosecuting witness as having been had with appellant, instead of submitting the facts to the jury. There is some force in appellant's criticism but we do not believe that the jury were misled by this instruction, for the court in the same instruction required the jury before finding appellant guilty, to find from the facts and circumstances that he was the father of said child.

Complaint is made as to the third instruction for the reason that the court informed the jury that the prosecuting witness was [illegible] [illegible] the state. We do not think that [illegible] [illegible] on this question, but we do not consider the giving of the [illegible] error.

[illegible] the reason that it informs the jury that in determining the weight that they should give to the testimony of [illegible] that they should take into consideration the interest of the result of the suit, [illegible], is [illegible] at the trial to [illegible] given by the witness. The part of the instruction [illegible] complai-

lant is, the reference to appellant's "conduct at the trial." The reference to appellant's conduct at the trial would be objectionable were it not for the fact that their consideration of his conduct at the trial is limited to his conduct so far as the same is disclosed by the evidence. So limited, we do not think there was error in giving the same.

The eleventh instruction given on behalf of appellee ~~is~~ was as follows: "If the jury believe that the prosecuting witness was mistaken as to the day that the alleged intercourse occurred, yet if you believe from the greater weight of the evidence that the defendant is the father of the child, then you should find the defendant guilty." The criticism on this instruction is the reference made to the fact that the prosecuting witness may have been mistaken as to the day of the alleged intercourse. This instruction does not seem to be complete in itself, as it is evident that something was left out of the instruction in drafting the same. However, we do not think that there was any serious error in the giving of this instruction as we understand the particular day is no more important in this kind of a case than it is in any other. Halcomb v. People ex rel 79 Ill. 415.

We have examined these instructions and while we are of the opinion that certain of the objections made by appellant to these instructions are well taken, still we are of the opinion that the errors contained in said instructions offered by appellant and which presented appellant's theory of the case in its most favorable light. In fact, the instructions of appellant required that before they could find him guilty, thejury must find that appellee had proven

are not of so serious a character that they would require a reversal of the judgment. The Court gave all of the instructions

her case by a clear preponderance of the evidence, thereby requiring a greater degree of proof of appellee's case than under the law she was required to produce. Peak v. People 76 Ill. 292.

3 The record also discloses that appellant admits having waited on the prosecuting witness at different times and also testified that on the evening preceding the one in question he accompanied her home from church, and he solicited her to have intercourse with him, but that she refused. This evidence is only important in so far as it indicates that if the prosecuting witness did not have intercourse with appellant, it was not his fault.

While we do not consider that the court was wholly free from error in its rulings on the instructions given to the jury, at the same time we do not feel that the errors were of a serious character or such as would prejudice appellant's case.

The evidence in this case was conflicting, depending almost entirely at the crucial points on the evidence of appellant and the prosecuting witness, and it was, therefore, peculiarly the province of the jury to determine the weight to be given to the evidence, and their verdict should not be disturbed where no serious errors in the rulings of the court have intervened.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported in full.

[illegible] by a clear preponderance of the evidence, thereby requiring a greater degree of proof of appellee's case than under the law she was required to produce. [illegible] v. [illegible]

The record also discloses that [illegible] [illegible] and also testified that on the evening preceding the one in question he accompanied her home from church, and [illegible] [illegible] with him, and that she returned. [illegible] that if the prosecuting witness did not have intercourse with appellant, it was not his fault.

[illegible] the jury, at the same time we do not feel that the errors were of a serious character or such as would prejudice appellant's case.

The evidence in this case was conflicting, depending almost entirely at the crucial points on the evidence of [illegible] distances where no serious [illegible] in the [illegible] of the [illegible].

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

[illegible]

[illegible]

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 22nd *day of April A. D. 1916.*

Clerk of the Appellate Court.

PINION

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the Seventeenth *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Julius Born,
Plaintiff in Error.

vs.

No. 21.

October Term, 1915

Theodore Schrieber,
Defendant in Error.

ERROR TO
~~APPEAL FROM~~

Circuit COURT

Randolph COUNTY

TRIAL JUDGE

HON. GEORGE A. CROW.

No. 21 In the Appellate Court Agenda No.9.

of Illinois, Fourth District.

October Term, A. D. 1915.

Julius Born, Plaintiff in Error.	
vs.	Error to Randolph County Circuit Court.
Theodore Schrieber, Defendant in Error.	

Opinion by Boggs, J.

This is an action in trespass brought by Julius Born, hereafter designated as plaintiff, against Theodore Schrieber, hereafter designated as defendant, for an assault and battery alleged to have been committed in the city of Red Bud, Illinois, on the 5th day of March, 1914. The declaration consists of a single count, in which it is charged that plaintiff was wrongfully knocked down and kicked by the defendant in a public street of said city. Damages claimed were Three Thousand Dollars.

The general issue was filed by defendant, and an agreement entered into of record that any evidence proper under special pleas could be admitted under the general issue. A trial was had resulting in a verdict and judgment for defendant. To reverse which judgment this writ of error is prosecuted.

The principal grounds relied upon for a reversal

of said cause are, first, that the verdict is against the manifest weight of the evidence; second, that the court erred in not granting a new trial on the ground that the witness, Dr. C. C. Smith, was not sworn before testifying, and third, that the court erred in the giving, modifying and refusing of instructions in said cause.

The record discloses that plaintiff at the time in question was about fifty-five years of age; that for sometime prior he had been suffering from a catarrhal trouble which affected his hearing and sight to a greater or less degree; that he was by profession a decorator, but had not followed any business in recent years; and that some ten years prior to the controversy in question he had sustained an injury by falling from a ladder from which injury he had never fully recovered. Defendant, who was engaged in the livery business, was a larger, younger and stronger man than plaintiff. The evidence further discloses that plaintiff and defendant were not on the best of terms.

On the morning of the day in question plaintiff had gone to the post office for his mail, and after securing the same he started down the street in an easterly direction. He had gone but a short distance when the defendant accosted him, making some insinuating remark and thereupon the trouble began.

It is claimed by plaintiff that defendant was the agressor; that he made some remark to the effect that plaintiff in error had wanted to whip defendant's father; that defendant rushed at him with fist upraised in a threatening

manner; that he felt several strokes below the left eye; that he fell back and while on the ground he felt three severe kicks on the right ankle and elbow; that he became unconscious and when consciousness was regained he was in a nearby store. The only eye witness to the transaction offerred by plaintiff was a man by the name of Pilate. His testimony was to the effect that defendant made some profane remark to plaintiff and grabbed him; that thereupon plaintiff in error turned and kicked defendant somewhere below the knees; that when grabbed, plaintiff fell and that while lying on the ground defendant kicked him and struck him with his fist.

On the other hand defendant says he was not the aggressor; that plaintiff kicked him before he ever struck plaintiff; that he never struck or kicked plaintiff while he was down; that he was trying to avoid trouble and only struck plaintiff in order to defend himself. Several eye witnesses to the transaction corroborated defendant to the effect that plaintiff gave the first blow. The injury sustained by plaintiff consisted of several severe bruises, but no physician was called to treat the same.

That plaintiff in error gave the first blow we think is supported by the clear preponderance of the evidence. The only serious question on the evidence is as to whether the defendant used more force than was necessary in defending himself or as to whether he, himself, after the first blow was given became the aggressor. There was a conflict of evidence on these issues and we are not able to say that the

jury were not fully warranted in finding for the defendant on these issues. At least, we are able to say that the verdict is not against the manifest weight of the evidence and that is all that is necessary for us to say in passing on the evidence. Hogan vs. Carlson, 182 Ill.App.21.

Second, it is contended that the court erred in not granting a new trial on the ground that Dr. Smith, one of the witnesses on behalf of defendant, was not sworn before testifying. This question was not raised until the motion for a new trial was heard. At that time affidavits were presented by plaintiff to the effect that the witnesses were all sworn at the beginning of the case and that the Doctor came in afterwards and that he was not sworn before testifying. The reporter's notes failed to show whether he was sworn or not. However, the doctor himself makes affidavit, positive in its character, that he was sworn, before he gave his testimony. The trial judge after considering these affidavits overruled the motion for a new trial, assigned on that ground among others.

No Supreme or Appellate Court cases were cited by counsel for either side where this point had been passed upon. The question, whether or not a witness was sworn before testifying is so peculiarly under the observation of the trial judge that we are not inclined to disturb his rulings on a matter of this character. Then, too, the testimony of this witness did not relate to any vital issue in the case, and even if it should be held that the evidence tended to show that he had not been sworn, still his testimony was not of

sufficient importance to warrant a reversal of the case.

Third, plaintiff complains of the modification by the trial court of instructions numbers three, four and seven, given on behalf of plaintiff. We have examined these instructions as offered by plaintiff, and as afterwards modified and given by the court. The modification of each of these instructions was more in matter of form than substance, and the meaning of the instructions as modified and given were practically the same as when tendered.

Plaintiff also insists that the court erred in refusing instructions numbers one, two, five, six, seven and eight offered by plaintiff. Instructions numbers one and two were abstract in character and there was no error in refusing them. Instruction number five was a proper instruction, but the matters contained in this instruction were fully covered by other instructions given. Instruction number six was to the effect that words spoken were no excuse for an assault. This instruction was correct in form and embodied a correct principle of law, but we do not think the court erred in refusing this instruction as there was no evidence in the case that rendered an instruction of this character necessary. Instruction number seven was an instruction with reference to punitive damages and while embodying a correct principle of law, an instruction given by the court advised the jury with reference to the rule in regard to the allowance of exemplary or punitive damages, and there was no occasion for repeating the same. Instruction number eight was argumentative in form and purported to in-

sufficient questions to warrant a reversal of the judgment.

Third, plaintiff complains of the modification in the trial court of instructions numbers three, four and seven, given on behalf of plaintiff. We have examined these instructions as offered by plaintiff, and as afterwards modified and given by the court. The modification of each of these instructions was not in [illegible] [illegible], and the meaning of the instructions [illegible] and [illegible] the same practically the same as given [illegible].

Plaintiff also insists that the court erred in refusing instructions numbers [illegible] offered by plaintiff. [illegible] were abstract in character and there was no [illegible] [illegible] [illegible], of the [illegible] contained in this [illegible] fully covered by other [illegible] [illegible] as to the effect [illegible] would apply [illegible] for an accident. This instruction was correct [illegible] correct principle of law, [illegible] the court erred in refusing [illegible] evidence in the case [illegible] [illegible] instruction [illegible] instruction with reference to [illegible] ing a correct principle of law, [illegible] the court advised the jury [illegible] [illegible] [illegible] was no occasion for [illegible] number eight was [illegible]

struct the jury with reference to matters that were foreign to the issues involved and we think there was no error in refusing the same.

Plaintiff also contended that the court erred in giving the first, third, fourth and fifty instructions offered on behalf of defendant. We have examined each of these instructions, and are unable to say that the court committed any error in the giving of the same. An examination of the instructions given by the court in this case shows that the jury were fairly instructed on all of the issues involved, and that no serious error was committed by the court in the giving, refusing or modifying of the instructions offered.

Finding no serious error in the record, the judgment of the trial court is affirmed.

Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 24th *day of April A. D. 1916.*

Clerk of the Appellate Court.

PINION

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199 A 106

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the Seventeenth *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Carson Cobine,
Appellant.

vs.

No. 30.

October Term, 1915

C. C. C. & St. L. Ry. Co. and
Chicago, Indianapolis & St.Louis
Short Line Ry. Co.,
Appellees.

199 I.A. 106

ERROR TO
APPEAL FROM

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON. LOUIS BERNHEUTER.

Term No. 30. In the Appellate Court Agenda No.57.

of Illinois, Fourth District.

October Term A. D. 1915.

Carson Cobine, Appellant. vs. Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and Chicago, Indianapolis & St. Louis Short Line Railway Company, Appellees.	Appeal from the Circuit Court of Madison County.

Opinion by Boggs, J.

This appeal is prosecuted by Carson Cobine from a judgment in bar of action and for costs rendered against him by the Circuit Court of Madison County in a suit brought by him against the Cleveland, Cincinnati, Chicago & St.Louis Railway Company and Chicago, Indianapolis & St. Louis Short line Railroad Company.

The declaration in said cause charged among other things that the C.C.C. & St.L.Ry.Co., lessee of the C.I. & St. L. S. Line Co., constructed a dam in a natural water course that flowed through the lands of appellant, and that by reason of the construction of said dam, the waters in said natural water course were obstructed in their flow through the lands of appellant and the waters in said stream were caused to back up on his said lands and over-flow the same, damaging the crops of appellant for which recovery was sought.

[illegible] No. 30. In the Appellate Court [illegible] No. 17.

of Illinois, Fourth District.

October Term A. D. 1918.

[illegible]

vs.

Clevelard, Cincinnati, Chicago & St. Louis Railway Company, and Chicago, Indianapolis & St. Louis Short Line Railway Company, Appellees.

Appeal from the Circuit Court of Jefferson County.

[illegible]

This appeal is prosecuted by [illegible] Robins from a judgment in favor of appellees and for costs rendered against him by the Circuit Court of Jefferson County in a suit brought [illegible]

[illegible]

The declaration in said cause charges among other things that the C.C.C. & St. L. Ry. Co., leased of the [illegible]

[illegible]

The original declaration was abandoned and three additional counts were filed by appellant, to which a plea of not guilty was entered. A trial was had and a verdict returned in favor of appellees. The motion for a new trial was allowed. A second trial was had and at the second trial the second and third of the additional counts were abandoned and the appellant relied alone on the first additional count. The second trial resulted in a verdict finding appellees not guilty. Judgment was rendered in bar of action and for costs, from which this appeal is prosecuted.

~~The evidence discloses that appellant owned~~ Plaintiff owns eighty acres of land lying one half mile north and south and a quarter of a mile east and west. The south end of said lands ~~is~~ was something over two thousand feet north of the dam in question. ~~The natural water course referred to is known as "Voyles Branch".~~ This water course entered ~~appellant's~~ plaintiff's land on the north line and flowed through said eighty acres so owned by ~~appellant~~ plaintiff the long way, and emptied on to a tract of land lying immediately south of ~~appellant's~~ plaintiff's land owned, or in the possession of ~~appellees~~ defendants. The stream ~~in question~~ averaged about six or seven feet in depth, and was about twenty feet in width from bank to bank. The dam ~~in question~~ was constructed during the latter part of the year 1910 and the early part of the year 1911. The center portion of the dam ~~is~~ was called the "Spillway", ~~and is~~ was made of concrete, and ~~The concrete portion of the dam is~~ was 69.7 feet wide. From the concrete spillway to the hill on each side the dam is built of earth, making the entire dam reach from one hill to the

other. ~~Appellees~~ Defendants thus formed a large reservoir north of the dam in which to collect and retain water to be used in the operation of their road. The top of the concrete spillway ~~is~~ was on the same level as the bottom of the branch at appellant's south line. ~~This is shown by a survey made by the engineer on behalf of appellant and by another engineer who made a survey at the instance of appellees. Said surveys were in practical agreement.~~

~~The evidence discloses that~~ The country through which this stream flows was hilly, and ~~that~~ the water at times of heavy rains would gather rapidly in ~~said~~ the stream, and ~~that~~ ~~said~~ the stream would overflow its banks. On the land owned by ~~appellant~~ plaintiff. ~~The evidence disclosed that~~ There was bottom land along the stream on each side thereof, composing about twenty-five or thirty acres of said eighty. ~~The evidence also discloses that~~ This natural water course had its source something like two miles north of the dam ~~in question.~~ ~~That~~ The bottom of the stream at the south line of ~~appellant's~~ plaintiff's land was approximately seven feet lower than the bottom of the stream at the north line of this said land. ~~In other words, that there was a fall of seven feet in a half a mile where the stream ran through appellant's premises.~~

~~The evidence also discloses that~~ South of the line of ~~appellant's~~ plaintiff's land there was bottom land, and ~~that~~ the fall was rapid, and ~~that~~ during times of heavy rains the water would spread out over these bottom lands after leaving ~~appellant's~~ plaintiff's premises.

The damages claimed by ~~appellant~~ plaintiff were to certain

stacks of hay on said bottom land owned by him and for damage done to the corn grown on said premises for the year 1910. The evidence discloses that some of the hay had been standing in stacks on said land for some three or four years and was practically worthless before the freshets came, and the evidence also discloses that the corn for which appellant claims was not gathered by him until the month of May 1911. His excuse for not having gathered it prior to that time was that he had so many other things on hand that he did not have time to get around to it.

Numerous errors are assigned on the record, but the only assignment of errors argued by appellant in his brief is that the court should have allowed a new trial for the reason that the verdict of the jury is against the manifest weight of the evidence and that the court erred in the giving of certain instructions tendered by appellees.

This case was tried by two different juries, both of which found against appellant. The ground relied on by appellant for a recovery of damages in this case is that the dam in question caused the water to back on his land, thereby injuring his crops, and that the dam obstructed the natural flow of the water. As stated above, the top of the spillway was on a level with the bottom of the stream at the south end of appellant's land. The stream according to appellant's statement was about twenty feet in width and about six and one half feet in depth. The spillway of the dam, according to appellant's statement, was 69.7 feet wide. It

would seem to follow as a necessary consequence that the dam, having a spillway of practically seventy feet in width, the top of which was on a level with the bottom of appellant's ditch, would not constitute a very serious obstruction, as the width of the spillway was three and one half times wider than the top of the stream as it flowed through appellant's land.

Appellant testified that he never knew that stream to overflow but once previous to the construction of said dam in 1910 and 1911. "That it was a good many years ago and it was called a cloud burst." Not witness s offered by appellant corroborated him in this statement. William Andrews, a witness called by appellant, testified "that he had known this stream for something over thirty years; that this stream rises rapidly and recedes rapidly" "I have known that stream thirty-five years; have seen it rise and flood many times." This same witness testified that in October 1911, the dam constructed by appellees went out; that before the dam broke he went up the stream to appellant's land; that the water was coming off of Cobine's land "right through the corn like a race horses"., which would seem to show conclusively that the dam did not obstruct the flow of water through appellant's land. This same witness was called by appellees and testified that before the dam was placed over Voyle's branch it overflowed a number of times. "In my judgment I will say about ten times before this dam was ever put in. Some of the over flows were great, and some of them the water was just out of the branch.

One rain-fall I recall we had some ground plowed, just got it plowed on one side and had the plow pulled on the other, that night come a big rain and a big space washed all of our plowed gound off and left it as smooth as a floor. That was in the forty south of Cobine's land."

William Voyles, another witness who testified on behalf of appellant was also called by appellees and testified as follows: "I have seen this branch over-flow many times before that dam was put in. When we had heavy rainfalls that branch would sometimes overflow." Without going into the testimony further it is only necessary to say that in our opinion the evidence fully warranted the jury in finding that the dam in question did not cause the water to back on appellant's land and that it did not obstruct the natural flow of the water through the same.

Appellant next contends that the court erred in giving certain instructions tendered by appellees for the reason that these instructions directed a verdict and did not contain all of the facts necessary to be determined by the jury before making up their verdict. We have examined these instructions and while they may be subject to some criticism, yet, we do not believe that any substantial error was committed by the court in the giving of them. Appellant insists that the instructions did not take into consideration the question of whether the dam in question obstructed the natural flow of the water, but only submitted to the jury the question of whether the dam caused the water to back on appellant's premises, and thereby damage his crops. There

is really no testimony in the record to the effect that the natural flow of the water was obstructed so there was no occasion for the court to submit that question to the jury. Appellant, himself, testified that the flow of water through his land washed certain of his crops down the stream and this would indicate that the flow of the water was not obstructed if it had sufficient momentum to float his crops.

Another objection is made by appellant that the court should have instructed the jury that they might award appellant nominal damages, even though they did not find from the evidence that he had suffered actual damages. A sufficient answer to this contention is that the only instruction given by ~~appellant~~ plaintiff, covering the measure of damages, required that the jury award only such damages as they might find from the evidence, so having tendered this kind of an instruction himself, he is not in a position to raise this question.

The issues in this case are primarily an issues of fact and two juries having found against the claim of appellant and there being no substantial errors in the record, this judgment should be affirmed.

Judgment affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 25th *day of April A. D. 1916.*

Clerk of the Appellate Court.

OPINION

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the 17th *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

199 I.A. 108

Commissioners of Highways
of the Town of Saline,
Appellee.

vs.

No. 31.

October Term, 1915

John Klaus,
Appellant.

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON. LOUIS BERNREUTER.

Term No. 31. In the Appellate Court Agenda No. 24.

of Illinois, Fourth District.

October Term A. D. 1915.

Commissioners of Highways of the Town of Saline, Appellee. vs. John Klaus, Appellant.	Appeal from the Madison County Circuit Court.

Opinion by Boggs, J.

The commissioners of Highways of the Town of Saline in Madison County, having received a petition for the vacation of a certain road in said Township known as the Alton and Greenville road, on due consideration ordered said road vacated. Being unable to agree with ~~appellant~~ defendant, who owned some seventy acres of land which was crossed at the extreme northeast corner thereof, by said road, sought to be vacated, filed their petition or certificate with a Justice of the Peace in said Town for the purpose of having the damages of ~~appellant's~~ defendants lands ascertained as provided by statute. A trial was had before the Justice of the Peace and a jury. The jury awarded ~~appellant~~ defendant $25.00 for his damages. Judgment was rendered by the Justice, from which judgment ~~appellant~~ defendant appealed to the Circuit Court. On the trial in the Circuit Court after ~~appellant~~ defendant had offered his

evidence, the commissioners moved the court to exclude the evidence and instruct the jury to find the issues for the petitioners, and that ~~appellant's~~ defendant's lands were not damaged. The motion was allowed and the jury were so instructed. Judgment was rendered on the verdict against ~~appellant~~ defendant for costs, from which judgment ~~appellant~~ defendant prosecuted an appeal to this Court, and at the October Term 1913, the judgment of the Circuit Court was reversed and the cause remanded for the reason that the evidence of ~~appellant~~ defendant tended to show that his land had been damaged from five to ten dollars per acre, and the holding of this court was that said cause should be submitted to a jury to ascertain the amount of damages, if any, to ~~appellant's~~ defendant's lands. ~~Said cause again came on for trial before a jury in the Circuit Court and said jury found the issues for appellees and that the lands of appellant were not damaged by the vacation of said road. A motion for a new trial was made which was overruled, and judgment was rendered on said verdict in bar of action and for costs, from which judgment appellant prosecuted the present appeal.~~

~~Appellant's first~~ Defendant contend~~ed~~ ~~is~~ that under the holding of this court on the former trial that it was conclusively determined that ~~appellant~~ defendant was entitled to damages on account of the vacation of said road. ~~We do not think the opinion rendered on the former hearing is susceptible of the construction placed upon it by appellant.~~ On the former trial no evidence was offered by ~~appellees~~ plaintiffs to meet or contradict the evidence of ~~appellant~~ defendant that his lands were

damaged by reason of the vacation of said road and it was stipulated by the parties on the former appeal that the evidence in the record tended to show that ~~appellant's~~ defendants lands were damaged; that being the statement of the record, this court held that the Circuit Court erred in excluding the evidence from the jury and instructing it peremptorily to return a verdict finding that the lands of ~~appellant~~ defendant were not damaged, as that was a question for the jury to determine from the evidence in the case. We do not think the opinion of this Court rendered on the former appeal is reasonably susceptible of any other construction.

It is next contended that the verdict of the jury is against the manifest weight of the evidence. We have carefully considered the evidence in the case and are of the opinion that the evidence in the record clearly sustains the verdict of the jury. A large number of farmers in the immediate neighborhood of appellant's lands testified that in their judgment the vacation of said road did not damage his said lands. In fact the number of witnesses who testified on behalf of appellee to the effect that said lands so owned by appellant were not damaged by the vacation of said road were considerably in excess of the number who testified on behalf of appellant that they were so damaged. ~~Appellant~~ Defendant owned in all about one hundred and twenty acres of land, the seventy acres ~~above entitled~~ and about fifty acres in addition thereto, adjoining said lands on the west. A public highway ran south from Saline through ~~Appellant's~~ defendants land so that all of the land of ~~appellant~~ defendant joined

this public highway and access thereto was obtainable therefrom. ~~Appellant's contention,~~ Defendant however, ~~was~~ that he could not reach the east side of his said farm from the highway running south from Saline on account of a certain creek that run in a northerly and southerly direction across his said land lying on the east side of said public highway. Said creek he insisted could not be crossed with teams or loads and at times could not be crossed by his stock, and that his only means of access to his said lands had been cut off when said road was vacated. ~~The evidence, however, discloses that~~ Defendant's ~~appellant's~~ land lying east of said public highway running south from Saline was considerably broken, and was largely covered with timber and was used by him as a pasture during all the time that he owned it, being some six or seven years, with the exception of the year 1914. ~~Appellant~~ Defendant testified that in 1914 he cropped about twenty acres of the same but did not get any considerable income therefrom on account of the cows destroying said crop. The evidence ~~The witnesses who testified in said cause~~ conflicting as to whether the creek ever [illegible] number of ~~witnesses who testified in said cause~~ testified to the effect that this creek could be crossed at practically all times of year and that during a large part of the summer season the creek was dry; that it had a hard bottom and the only thing necessary to make a good ford or crossing place was to cut down the banks. Appellant, also, insisted that he was hindered from hauling lumber, posts, etc. from said land on account of the vacation of said road, but he did not substantiate this claim by the evidence. We therefore hold that the evidence fairly preponderates to the effect that

appellant's lands were not damaged. It might be further observed that according to the survey made by the engineer who testified on behalf of appellees, there is some question whether this road that was vacated crossed any part of appellant's land. Taking the most liberal view of the evidence in that regard, the most that can be said is that it cut off only a few feet of appellant's land at the northeast corner thereof.

It is next contended by appellant that the court erred in permitting appellee to offer in evidence the record of the laying out of a road running north and south along the east side of his land, which said road was laid out sometime after the road in question was vacated. The record discloses that the court on the objection of appellant refused to allow appellees to offer said record of said road or to refer to the same in the examination of witnesses except in rebuttal, when the court over objection of appellant allowed appellees to offer said record. We donot believe that appellant was prejudiced by the ruling of the court for the reason that all of the witnesses who had testified in chief both for appellee and for appellant testified with reference to the question of damages to appellant'slands by the vacation of the road in question, and without any reference whatever to the new road located on the east side of his said land. So that in determining the question of whether appellant's lands were damaged by the vacation of the road in question, the witnesses who testified had their attention directed solely to the affect of the vacation of said road without reference to any

new road that may have been located along appellant's land. We think too that appellant, in effect, waived this objection by reason that he afterwards of his own motion offered witnesses tending to prove the damages suffered to his said lands from the vacation of the road in question at the time that the new road on the east side of his said premises was opened up, being a period of something over three years. It is further to be observed that appellant submitted an instruction to be given the jury directing the attention of the jury to the new road that had been established along the east side of his said premises and informed the jury that they would have the right to take that road into consideration in mitigation of the damages sustained by his lands but not in bar of such damages. If appellant wanted to raise the question of the correctness of the ruling of the court in regard to the admission of the record of said road in evidence he should have submitted an instruction to the court to be given to the jury to the effect that the jury should not take said new road into consideration in the making up of their verdict on the question of damages. No such instruction was tendered by appellant, but an instruction was tendered by him as above stated to the effect that the jury had the right to take into consideration the effect of the new road as going in mitigation of his damages. For that reason, we do not believe appellant is now in a position to urge as error the admission in evidence of the record of said new road.

It is next contended by appellant that the court erred in giving the first, third, fourth, and sixth instruc-

tions given by the court to the jury on behalf of appellee. Said first instruction is to the effect that appellant would not be entitled to damages simply or merely on account of the fact that he had been made a party to the proceeding to vacate said road. We believe this instruction states a correct principle of law and there was no error in the giving of the same. It cannot be urged from the mere fact that a person may be made a party to a proceeding to vacate a road that he would, therefore, necessarily be entitled to damages. We understand damages only follow as a matter of course in a proceeding where lands are condemned for road purposes and said lands are actually taken. When lands are so taken damages under the constitution follow as an absolute right, but as to lands not taken it does not necessarily follow that the owner is entitled to damages, for if his benefits from the vacation of the road or from the making of a road equal or are greater than his damages, then, under the law, there would be no damages. If the road in question crosses or even touches appellant's land, in order to vacate the same it would be necessary to make him a party, but it does not follow that he would be entitled to damages. The matter of damages is a question for the jury to determine as provided by the statute, and if the jury under the evidence and instructions of the court should find that the benefits to be derived by the land owner by the vacation of the road or by the construction of a road, so far as lands are taken are concerned, equalled or exceeded the damages, then there would be no damages. Fraser v. Achenbach, 29 Ill.App.373; Brown

v. Robertson, 123 Ill.634.

It is also insisted by appellant that before the road in question could be vacated the damages to his land must be ascertained; that it was jurisdictional. The holding, however, of the Supreme and Appellate Courts are both to the contrary. Fesser v. Achenbach, supra; Brown v. Robertson, supra.

In the case of Brown v. Robertson, supra, at page 634, the Court says: "Counsel for appellant also urge the objection that it does not appear that damages have been assessed to Halbrenner and Wood, or that they have relinquished their claim thereto. The answer to this is, none of their land is taken by the vacation and re-location of the road, and it does not appear that they sustain any damages thereby. The statute only requires that the damages to the lands over which the road shall pass shall be ascertained. . . . For land damaged, but not taken, the owner may be compensated by benefits. While the public can acquire no right to take the land of an individual for a highway, who has not consented thereto, until he is compensated therefor, the question of damages to land not taken may be adjusted afterwards."

The two cases cited both hold that the vacation of a road is not a taking as contemplated under the Eminent Domain Statute or the road and bridge statute, but that damages for the vacation of a road, if any, are damages that are to be ascertained as for lands not taken.

The next instruction complained of by appellant

is appellee's instruction No. three. This instruction informs the jury that they had no right to allow appellant any damages on account of the location of the new road along the east side of his farm, as that matter had been disposed of. We see no special reason why the court should have given this instruction, nor do we see that it could have done any particular harm. At any rate, appellant cannot complain of the giving of this instruction for the reason that he, himself, tendered an instruction directly calling the jury's attention to said road and informing them that they had the right to take the matter of the new road into consideration in mitigation of the damages his land might sustain.

Appellee's fourth instruction is complained of by appellant for the reason that it informs the jury that appellant must prove the damages to his land by the greater weight or preponderance of the evidence. We believe this states a correct principle of law for under the above authorities any damages sustained by appellant under the statute is for damages to lands not taken and as to such damages the burden of proof is on the land owner to prove the same.

The sixth instruction given on behalf of appellee is to the effect that if the jury find from the evidence that the vacation of the road in question did not deprive appellant from ingress and egress to a portion of his farm by means of a public road or highway, that then he would not be entitled to damages. We do not believe that this instruction

should have been given as it might be construed by the jury as meaning that if appellant had another highway to reached his lands, that, therefore, he could not be damages on account of the vacation of the road in question. However, we do not think this instruction could do appellant any serious damage as it does not direct a verdict and as the jury were fully instructed by the court at the instant of appellee as to the matters and things they were to take into consideration in determining the damages, if any, appellant was entitled to. In fact, the court gave every instruction offered by appellant and we think that the instructions as a whole fairly presented appellant's theory of the case to the jury. We are also of the opinion that the verdict in this case under the evidence does substantial justice and that the court, for any ol or errors that may appear in the record, would not be warranted in reversing this cause, and that the judgment should therefore be affirmed.

Judgment affirmed.

Not to be reported in full.

should have been given as it might be construed by the jury as meaning that if appellant had another highway that reached his lands, that, therefore, he could in no case sue on account of the vacation of the road in question. However, we do not think this instruction could do appellant any serious damage as it does not direct a verdict for the jury were fully instructed by the court as the effect of specific as to the evidence and things they were to take into consideration in determining the damages, if any, appellant was entitled to. In fact, the court gave many instructions offered by appellant and we think that [illegible] theory of the case to the jury. We are also of the opinion that the verdict in this case under the evidence does not [illegible] that now appears in the record, would not be warranted in reversing this cause, and for the [illegible] and is affirmed.

Judgment affirmed.

[illegible] in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 19th *day of April A. D. 1916.*

Clerk of the Appellate Court.

PINION

199 A 112

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the ----17th----- *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

199 I.A. 112

B. Riley Hauk,

Appellee.

vs.

No. 35.

October Term, 1915

Sue B. Louden and Mildred Louden, Executrices of the Estate of Walter S. Louden, deceased.

Appellants.

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Clinton COUNTY

TRIAL JUDGE

HON. JAMES C. MC BRIDE.

Term No. 35 In the Appellate Court Agenda No. 49

of Illinois, Fourth District.

October Term, A. D. 1915.

E. Riley Hauk, Appellee vs. Sue E. Louden and Mildred Louden, Executrices of the Estate of Walter, S. Louden, deceased, Appellants	Appeal from the Circuit Court of Clinton County.

Opinion by Boggs, J.

This appeal is prosecuted by appellants as executrices of the estate of Walter S. Louden, deceased, from a judgment for $1010.00 rendered by the Circuit Court of Clinton County, against said estate. There were no written pleadings filed, but a claim in the following form: " state of Walter S. Louden, deceased to E. Riley Hauk, Dr. Dec.29, 1913, to cash advanced purchase 10 shares of capital stock of L.& O. Milk Company, said stock, by agreement to be taken up in the name of claimant with the understanding and agreement that in consideration thereof the deceased would take up said stock and refund the purchase price on or before August 29, 1914.....$1000.00. Interest on said sum at 5 per cent to date..... 18.62.

Total .....$1018.62, was filed in the County Court

of said County against said estate, and by agreement of all parties interested, the claim was transferred to the Circuit Court for trial. A jury was waived and a trial had resulting ~~in a finding and judgment in favor of appellee.~~

J. E. Vogelsang, a witness for ~~appellee~~ plaintiff, had a claim for the same amount, based on the same facts involved in this case. The trial court heard the evidence in support of both of these claims at the same time. ~~Appellee~~ Plaintiff in the case at bar was the president of and stockholder in the E. Riley Hauk Supply Company, a corporation of St. Louis, Mo., hereafter for convenience designated as the Supply Co., whose business was the handling of milk, milk products and dairy supplies. Vogelsang was Secretary and Treasurer and a stockholder in said Company. Walter G. Louden, the deceased, was for many years prior to his death the president of a Corporation known as the W. & O. Milk Co. of Waterloo, Illinois, hereinafter for convenience designated as the W. & O. Co., whose business was the buying and shipping of milk and dairy products.

~~On May 24, 1913, the W. & O. Co., entered into a contract with the Supply Co. to furnish certain milk supplies for the sum of six thousand dollars, which contract before entirely carried out was abandoned and another~~ a contract was entered into ~~on the 20th day of November of said year,~~ by which the Supply Company agreed to purchase of the W. & O. Milk Co. one thousand cases of milk for a consideration of Three Thousand Dollars, which consideration was evidenced by sixteen notes aggregating said amount, and these notes were

[illegible]

by the M. & C. Co., indorsed and were negotiated at its Bank for the purpose of raising funds to carry on its business. Thereafter, the M. & C. Co. becoming financially involved, Walter S. Louden, its president, undertook to reorganize the same, and found that before this could be done it would be necessary to provide for the existing indebtedness of said Company, part of which indebtedness was the Three Thousand Dollars of notes, which the M. & C. Co. had received from the Supply Co., and had indorsed and negotiated through its bank.

In order to rid the M. & C. Co., from its obligation as indorser on the notes of the Supply Co. Walter S. Louden, its President, approached ~~appellee~~ Plaintiff and Vogelsang, with the proposition that they purchase fromthe new Company, which Louden was proposing to organize, three thousand dollars of its capital stock, and the proceeds of the capital stock to be used to take up these notes. ~~Appellee~~ Plaintiff and Vogelsang ~~did not take to the proposition at first, but~~ finally arrived at an agreement with Louden ~~was reached~~ by which the M. & C. Co. as re-organized were to issue to ~~appellee~~ Plaintiff and Vogelsang $1500.00 respectively of its capital stock, and the agreement was carried out and appellee and Vogelsang as President and Secretary of the Supply Co., called a meeting of said Company and ratified the transaction as one made by the Company and at said meeting passed a resolution wherein it was recited that ~~appellee~~ Plaintiff and Vogelsang had agreed, in order to release the M. & C. Co., of its obligation on the contract relating to the payment of the three thousand dollars in notes (being notes given by

by the A. & G. Co., incorred and were [illegible] of the
bank for the purpose of raising funds to carry on the busi-
ness. Thereafter [illegible] (immediately)
volved, Walter S. Louden, its president, [illegible]
organize the same, and found that before [illegible]
it would be necessary to [illegible]
of said Company, part of which indebtedness was the [illegible]
Thousand Dollars of notes, which the [illegible] had re-
ceived from the Supply Co., and had indorsed and [illegible]
[illegible] the bank.

In order to aid the A. & G. Co., from its difficul-
tion as indorser on the notes of the Supply Co. Walter S.
Louden, its president, [illegible]
with the [illegible]
which Louden was proposing to organize three thousand dol-
ar i.e capital stock, and the proceeds of the capital stock
to be used to take up these notes. [illegible]
did not take to the proposition at first, but finally an
agreement was reached by which the A. & G. Co. [illegible]
were to issue to Louden and Vogelsang [illegible] of
of its capital stock, and the agreement was carried out and
appliles and Vogelsang as President and Secretary of the
Supply Co., [illegible]
transaction as one made by the Company [illegible]
passed a resolution wherein it was [illegible]
Vogelsang had caused, in order to relieve [illegible]
of its obligation on the contract relating to [illegible]
of the three thousand dollars in notes [illegible]

the SupplyCo. to the M. & O.Co. and by it indorsed and negotiated) to take each $1500.00 of preferred stock of the M. & O. Co., and reimburse the Supply Co. for the payment of said notes when due. It ~~is~~ was further provided in said resolution that ~~appellee~~ plaintiff and Vogelsang had covenanted and agreed to give the Supply Co. their personal notes due on or before one year for $1500.00 each, and that by said transaction, the M.& O. Co. was released of all further obligation pertaining to the contract. After this meeting of the Supply Company on Dec. 20, 1913, a letter was written by the Supply Co. to the ~~Union Trust and Savings Bank of East St. Louis, being the~~ bank that held the notes of three thousand dollars indorsed by the M. & O. Co., which letter among other things contained the following: "We therefore advise you that under an arrangement made with W. S. Louden today, B. Riley Hauk, President of our Company and J. B. Vogelsang, Secretary and Treasurer of our Company, have mutually agreed to take $1500.00 of the ~~common~~ preferred stock of the M. & O. Co. and in turn have made financial arrangements with the B. Riley Hauk Supply Co. to take care of the above financial obligations, and the B. Riley Hauk Supply Company hereby agrees to pay these notes releasing the M. & O. Milk Company from any liability."

~~The evidence further discloses that~~ Upon receipt of said stock from the M.& O. Co. ~~appellee~~ plaintiff and Vogelsang each executed to the Supply Co. their individual note of $1500.00 each and deposited, respectively as collateral ten shares of the capital stock of said M.& O. Co., as re-organized

the Supply Co. to the [illegible] Co. and by it [illegible] negotiated) to take each [illegible] of preferred stock of the [illegible] Co., and receive the [illegible] Co. [illegible] ment of said notes when due. [illegible] in said resolution that [illegible] and operators and employees and agreed to give the Supply Co. their personal notes [illegible] on or before one year for $1000.00 each, and that by said transaction, the [illegible] Co. was released of all further obligation pertaining to the contract. [illegible] of the Supply Company on Dec. 20, 1921, [illegible] by the Supply Co. to [illegible] three thousand dollars indorsed by the [illegible] Co., which letter among other things contained the following: "Therefore advise you that under an arrangement made with [illegible] Longan today, Mr. Riley Hunt, President of our Company and [illegible], Secretary and Treasurer of our Company, have mutually agreed to take 1000 of the preferred stock of the [illegible] Co. and in turn have made financial arrangements with the Riley Hunt Supply Co. to take care of the above financial [illegible]. [illegible] Company hereby agrees to pay these notes referring to [illegible] Milk Company from any liability."

The evidence further discloses that Mr. [illegible] of said stock from the [illegible] Co. [illegible] each executed to the Supply Co. their individual note of $1000.00 each and deposited, respectively as collateral security thereon of the capital stock of said [illegible], [illegible]

and under some arrangement with Louden, he executed certain notes to the SupplyCo. aggregating $1000.00 and five of the shares of stock issued to ~~appellee~~ plaintiff and five of the shares of stock issued to Vogelsang was deposited as collateral with the note of Louden--that is to say, the Supply Co. held the notes of ~~appellee~~ plaintiff and Vogelsang for $1500.00 each and the notes of Louden for $1000. with thirty shares of the capital stock of the M. & C. Co. as security forthe Three Thousand dollars which it assumed and afterwards agreed to pay to take up the three thousand dollars of notes indorsed by the M. & C. Co. and negotiated through its bank. The note [illegible] by the Supply Co. out of its own funds.

Walter L. Louden died February 9, 1914, his will was probated and appellants were appointed executrices by the County Court of Clinton County. Before his death Louden had paid one note of $66.66 given to the Supply Co. and after his death the claim was probated for $938.87 against his estate by the Supply Co., said claim was allowed and a dividend of seventy-five per cent was paid thereon. The record also discloses that a dividend of three per cent was paid on the thirty shares of stock issued to appellee and Vogelsang by the M. & C. Milk Co.

No propositions of law were submitted by appellee. Twelve propositions of law were submitted by appellants, some of which were held and some were refused. The first and second propositions submitted by appellant were marked refused by the court and are as follows: "First: that there is no competent evidence offered in this case sufficient to support a finding in favor of the claimant."

and under some arrangement with Louden, [illegible]
notes to the Supply Co. [illegible]
shares of stock issued to [illegible]
of stock issued to [illegible]
the note of Louden--that is to say, the [illegible]
[illegible]
of Louden for $1000, with thirty shares of the [illegible]
[illegible]
the three thousand dollars of notes indorsed by the [illegible]
Co. and negotiated through its bank.

[illegible]
Walter B. Louden died January [illegible]
was probated and appraisers were appointed executrices by
the County Court of Clinton County. Before his death Louden
had paid one note of $66.66 given to the Supply Co. and
after his death the claim was probated for $958.67 against
his estate by the Supply Co., said claim was allowed and a
dividend of seventy-five per cent was paid thereon. The
record also discloses that a dividend of three per cent was
paid on the thirty shares of stock issued to Louden and
[illegible] by the [illegible] Co.

[illegible] propositions of law were submitted by [illegible].
Twelve propositions of law were submitted by [illegible],
of which were held and some were refused. The [illegible]
second proposition was [illegible] by [illegible]
[illegible] by the court and [illegible]
[illegible] competent evidence [illegible]
support a finding in favor of the [illegible].

"Second, that John B. Vogelsang is not a competent witness in this case and his evidence should be disregarded." If the court was correct in its rulings on these two propositions the judgment rendered by the court should be affirmed. If the court erred in refusing these propositions then said judgment should be reversed.

It is practically conceded in this case that if J. B. Vogelsang was not a competent witness on behalf of appellee, there is no competent evidence in the record to sustain the findings and judgment of the court. Appellant, however, further insists that even though, Vogelsang was a competent witness on behalf of Appellee, still the evidence in the record, Vogelsang included, is not sufficient to support the finding and judgment of the Court.

In order to determine whether the evidence in the record is sufficient to support the finding and judgment of the court and as to whether the witness Vogelsang was a com- ~~petent witness it will be necessary to refer~~ as to the conversation which took place between ~~appellee~~ plaintiff and Vogelsang and Louden at the time Louden approached ~~appellee~~ plaintiff and Vogelsang with the proposition that they should take three thousand dollars of stock of the M. & O. Co., in order that the same might be re-organized as above stated, ~~Appellee~~ plaintiff testified that Louden stated to him at said time, "We are going to increase the capital stock and re-organize down at Waterloo and make it a cooperative company and get the farmers interested in taking stock to the extent of $100,000.00." He says, "Before we can make that move there is an obligation"--I don't know whether

it was himself or whether it was the company--"of $50,000. which had to be cleaned up." I says, How is that going to be done, He says, "We want you to take stock in that company, at least the remainder of that amount of these notes." ..... He says, "Here is the plan. You take $2000.00 worth of stock-- yourself and Vogelsang.-and I will issue you also $1000.00 worth of stock, $500.00 to each, and make it $1500.00; and $1000.00 I will give you my personal note for and put that stock up as collateral and I will assure you that if you will take and help me out in this transaction that I will dispose of that $2000.00 worth of stock." . . . . I will take and dispose of your stock for you; in ninety days you will have your money back." ~~This in substance is the testimony of appellee so far as it pertains to said transaction.~~

The testimony of Vogelsang ~~is~~ was practically to the same effect as ~~appellee's~~ plaintiff's with reference to the conversation and transaction had with Louden, ~~and we do not deem it necessary to refer to the same except as to that part which vitally effects this case.~~ Vogelsang testified that after the proposition made by Louden with reference to their taking stock, he said, "Walter, how soon will you clean us up then?" He says, "I can't promise you anything but you hold that stock temporarily until we get the reorganization completed and I will have plenty of money and will clean the matter up." I asked him how long that would take, and he said, "probably sixty or ninety days." I says, why not give your notes for all of it? He says, "I couldn't make my

arrangements at the bank if we did." He says, "Vogelsang you will never regret this and you will be cleaned up before spring arrives." It was on the testimony of ~~appellee~~ plaintiff and of the witness Vogelsang with reference to this conversation and transaction had with W.S.Louden, being the testimony that ~~appellee~~ plaintiff based his claim for recovery in this case.

In our opinion the evidence above referred to falls short of proving a binding contract on Walter S. Louden, the deceased, to re-purchase said stock issued to appellee and to Vogelsang. The testimony of appellee is to the effect that Louden agreed to re-sell or dispose of the stock for them while Vogelsang's is to the effect that when he got the corporation organized he would have money so that he could clean the matter up for them within sixty or ninety days. The record also discloses that the claim filed by appellee ~~is~~ was to the effect that it was for money advanced to the decedent for the purpose of purchasing certain shares of stock in the [illegible] Company, and which stock was to be re-purchased or was to be taken up by Louden on or before August 1, 1914, which would have been about eight months from the date of the transaction by which ~~appellee~~ plaintiff obtained said stock. This claim was sworn to by appellee, but his testimony in the case was to the effect that whatever was to be done was to be done within sixty or ninety days, which does not corroborate his claim filed, and the affidavit in support thereof.

We now pass to the question of the competency of Vogelsang as a witness for appellee. The objection to his competency having been specifically made. It is contended by

arrangements at the bank if we did." He says, "Anything you will never regret this and you will be glad up [illegible] spring arrives." It was on the testimony of [illegible] [illegible] that [illegible]

[illegible] on and transaction had with T. J. Lowden, in the [illegible] money that Lowden based his claim for recovery in the [illegible]

In our opinion the evidence above referred to [illegible] short of proving a binding contract on Mr. Lowden, the deceased, to re-purchase said stock issued to Wheeler and to Wolfenden. The testimony of appellee is to the effect that Lowden agreed to re-sell or dispose of the stock for them while Wolfenden's is to the effect that when he got the corporation organized he would have money so that he could [illegible]

The record also discloses that the claim filed by appellee is to the effect that it was for money advanced to the decedent for the purpose of purchasing certain shares of stock in the T. J. L. Company, and which stock was to be re-purchased when to be taken up by Lowden on or before August 1, 1918, which would have been about eight months from the date of the transaction by which appellee obtained said stock. The claim was sworn to by appellee, but his testimony in the court was to the effect that Lowden was to be made use of in [illegible] the claim filed, and the affidavit in support thereof.

We now pass to the question of the competency of Wolfenden as a witness for appellee. The objection is to the competency having been specifically made. It is contended

appellant that he is an incompetent witness for the reason that he was an officer and stockholder in the Supply Co. and that the Hauk Supply Co. was directly interested in the result of the judgment to be rendered on the claim filed by appellee and it is also contended by appellant that he was an incompetent witness for appellee for the further reason that Vogelsang and appellee were personally responsible to the Supply Co. for the $3000.00 paid by the Supply Co. to take up the notes at the bank that were negotiated by the L. & O. Co. we will take up the latter proposition first, as we believe the evidence in this case conclusively establishes that appellee and Vogelsang in the transaction had by which the Supply Co. undertook thepayment of the $3000.00 in notes held by the Bank through the negotiations of the L. & O. Co. made themselves liable jointly and severally, directly to the Supply Co; for the payment of said notes, as the evidence discloses that said notes were paid out of the fund of the Supply Co. The minutes of the special meeting of the board of directors of the Supply Co. above referred to ~~is~~ were to the effect that ~~appellee~~ plaintiff, and J.B.Vogelsang, as the only directors present, entered into a contract with the L. & O. Milk Co., issued certain promissory notes maturing on the 26th of February, March, April, June, July and August, amounting to $3000.00, and for special consideration and advantages to the Supply Co. ~~appellee~~ plaintiff and Vogelsang agreed, in order to release the L. & O. Co., of its obligation to take up the Supply Co. Notes for $3000.00 as above stated; to take each $1500.00 of preferred stock of the

E. & C. Co. and to reimburse the Supply Co. for the payment of the above notes when due. There ~~is~~ was nothing in the record to disclose whether ~~appellee~~ plaintiff and Vogelsang constituted a quorum of the directors for the transaction of business of said Company or as to whether the other directors of said Company, if any, were notified of said meeting, but it does not lie in the mouth of appellee and Vogelsang to dispute the record of the meeting made by them. If, however, this special meeting was not held in compliance with the by-laws of said corporation, and would not be binding on said corporation by reason thereof, the evidence offered by appellee is to the effect that in compliance with the record made of this meeting, the funds to the amount of $3000.00 of the E.Riley Hauk Supply Co. was used for the payment of said notes, and if said meeting was not a regular meeting and binding on the corporation, appellee and Vogelsang, by reason of their action as such officers in causing the funds of said corporation to be so applied, would render themselves jointly and severally liable to said corporation for the amount so expended.

The evidence of the bookkeeper for the Supply Co., ~~is~~ was to the effect that after the special meeting of the Supply Co.in which it was made to assume and pay the Three Thousand Dollars of indebtedness heretofore referred to, a charge was entered against the E. & C. Milk Co., J. E. Vogelsang and E. Riley Hauk, for $3000.00. Said witness testified that this account appears on a private ledger of said Company,

[illegible]

and showed that the account was carried against both Vogelsang and appellee, and that all sums received in the way of dividends or credits in connection with this transaction was credited to said account. After the death of Louden, $710.51 was paid on the claim probated against his estate by the Supply Co., and which amount so paid was applied on the joint indebtedness of ~~appellee~~ plaintiff and Vogelsang, and the amount still owing by ~~appellee~~ plaintiff and Vogelsang on this account as shown by the books of said Company ~~is~~ was $2132.82. We refer to this record evidence for the reason that we feel that it conclusively shows that Vogelsang and appellee were jointly liable to the Supply Co. for the amount that said Company had expended from its funds to take up the indebtedness owing by the M. & O. Co., and that being so liable, Vogelsang would not be a competent witness on behalf of appellee, nor would appellee be a competent witness on behalf of Vogelsang, as they would be directly interested in the result of the respective suits of the other. In other words, we think, the evidence in this case tends conclusively to the effect that all sums recovered from the Louden estate, in whatever way recovered, is applied on the joint account against appellee and Vogelsang.

Another circumstance in this case we think that goes to corroborate this theory is that, whereas, fifteen shares of the M. & O. Co., stock was issued to appellee and fifteen shares to Vogelsang, yet, five shares of the stock issued to appellee and five shares of the stock issued to Vogelsang were by written agreement between Louden, appellee and Vogelsang,

and shows that the account was carried against [illegible] Vogelsang and Spaeglice, and that all sums received in the way of [illegible] credited to said account. After the death of [illegible], [illegible] was paid on the claim presented against his estate by the Supply Co., and which amount so paid was applied on the joint indebtedness of Spaeglice and Vogelsang, and the amount still owing by Spaeglice and Vogelsang on this account is shown by the books of said Company as $2132.82. [illegible] record evidence for the reason that we feel that it [illegible] relatively [illegible] Vogelsang and Spaeglice [illegible] liable to the Supply Co. for the amount that [illegible] expended from its funds to take up the indebtedness owing by the [illegible] Co., and that being so liable, [illegible] would not be a competent witness on behalf of [illegible], nor would Spaeglice be a competent witness on behalf of Vogelsang, as they would be directly interested in the success of the respective suits of the other. In other words, [illegible] the evidence in this case tends conclusively to the effect that all sums recovered from the Tucson estate, in [illegible] way recovered, is applied on the joint account [illegible] and Vogelsang.

Another circumstance in this case [illegible] to corroborate this theory is that, whereas, [illegible] of the [illegible] Co., stock was issued to Spaeglice and [illegible] shares to Vogelsang, yet, five shares of the stock [illegible] Spaeglice and five shares of the stock issued to Vogelsang [illegible] by written agreement between them, [illegible]

Assigned as collateral security to said Supply Co., and held with said notes aggregating $1000.00 given by Louden, and that on Louden's death, the amount recovered by said notes was applied directly on the joint indebtedness of appellee and Vogelsang to said Supply Co. There isn't any evidence in the record tending to show that the ten shares of stock issued to appellee, and the ten shares issued to Vogensang by the [illegible] & C. Milk Co. were anyother than bona fide sales of said stock to said parties, except the testimony of Vogelsang and appellee, and we hold that they were incompetent witnesses, but even if they should be held to be commetent witnesses, their testimony is not sufficient to establish their respective claims against the estate of Walter S. Louden.

Nor, do we think that the fact that appellee and Vogelsang each executed to the Supply Co., their individual notes for $1500.00 changes their liability to said Company, as the evidence in the record does not prove or tend to prove that said Company took said notes in satisfaction of the indebtedness owing to it by reason of its paying the notes held by said Bank above mentioned. It will be remembered that there was only $3000. charged against the [illegible] & [illegible] Co., appellee and Vogelsang on the books of the Supply Co., yet, as collateral to said account, said Company held $1000.00 of the notes of Louden, with ten shares of the stock of the [illegible] & [illegible] Milk Co., and the notes of Appellee and Vogelsang for $1500.00 each, making in all $4000.00 of notes, to secure an indebtedness of $3000. which would go to show that these notes were simply put up as additional security for said account, and

Assigned as collateral security to paid Supply Co., [illegible]
[illegible]
[illegible] on Loudon's death, his account receivable by [illegible]
applied directly on the joint indebtedness [illegible]
vogelsang to said Supply Co. There isn't any evidence [illegible]
record tending to show that the ten shares of stock [illegible]
appellee, and the ten shares issued to Vogelsang by [illegible]
G. Ilk Co. were anywhere than bona fide sales [illegible]
to said parties, except the testimony of [illegible]
and we hold that they were incompetent witnesses, [illegible]
if they should be held to be competent witnesses, their testimony is not sufficient to establish their [illegible]
against the estate of Walter G. Loudon.

Nor, do we think that the fact that [illegible]
vogelsang each executed to the Supply Co., their individual notes for $100.00 changes their liability to said company, the evidence in the record does not prove or tend to prove that said Company took said notes in satisfaction of the indebtedness owing to it by reason of its buying the notes held by said bank above mentioned. It will be remembered [illegible]
and vogelsang on the books of the Supply Co., [illegible]
eral to said account, said Company held $100.00 [illegible]
of Loudon, with ten shares of the stock of the [illegible]
Co., and the notes of Appellee and vogelsang [illegible]
making in all $400.00 of notes, to secure [illegible]
of $500.00, which would go to show that [illegible]
simply put up as additional security [illegible]

not in settlement of the same. Then, too, it must be remembered that appellee as President, and Vogelsang as Secretary and Treasurer, of the E. Riley Hauk Supply Co., were dealing with themselves as individuals and in said capacity as President and Treasurer, they would have no right to relieve themselves as individuals from their obligation to the Company, except upon full payment of their said obligations.

We have not referred to any of the authorities cited by the appellee in this proceeding for the reason that both parties concede that if the witness Vogelsang is directly interested in the result of this suit, that then he would not be a competent witness, and it is our holding in this case that he is directly interested in the result of this suit and that his interest is based on the fact that he and appellee were jointly and severally liable to the Supply Co., for the $3000.00 expended by said Company to take up the notes negotiated by the L. & O. Milk Co., and for the further reason that the evidence discloses that whatever amounts were being collected from the estate of Walter S. Louden, deceased, or were collected from dividends on said stock were applied on said account owing by said Vogelsang and appellee to the Supply Co. We do not pass on the question as to whether the Supply Co. is directly interested in this proceeding as it is not necessary for a determination of the case.

For the errors made by the court in refusing to hold the first and second propositions of law submitted by appellant and for finding that the evidence in this case warranted a judgment against appellants as administrators of the estate of Walter S. Louden, deceased, said cause is reversed and remanded. Reversed and Remanded.

Judge McBride took no part on the hearing or decision of this case.

Not to be reported in full.

not in settlement of the case. Then, too, it must be remembered that [illegible] an incident, and [illegible] necessary and proper. [illegible] were dealing with themselves as individuals and as [illegible] property [illegible] right to relieve themselves as individuals from [illegible] liquidation of the company, [illegible] and obligations.

We have not referred to any of the [illegible] position concede that if the witness [illegible] interested in the result of this suit, [illegible] be a competent witness, and it is our holding in this case that [illegible] is directly interested in the result of [illegible] were jointly and severally liable to the [illegible] amended by said Company to take on the [illegible] petitioned by the R. S. Cliff Co., and for [illegible] collected from the estate of Walter S. [illegible], [illegible] were collected from evidence on said [illegible] said account owing by said [illegible] Supply Co. We do not agree on the question [illegible] the Supply Co. is directly interested in [illegible] it is not necessary for a determination of [illegible]

For the errors made by the court [illegible] the first and second propositions of [illegible] ment and for finding that the evidence in [illegible] a judgment against [illegible] of Walter S. Louden, [illegible] manded.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this ..... *day of April A. D. 1916.*

.....

Clerk of the Appellate Court.

PINION

99 A 119

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the Seventeenth *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

199 I.A. 119

John C. Hahn and Amanda I. Hahn,
Appellants.

vs.

No. 36.

October Term, 1915

U. W. Easton,
Appellee.

ERROR TO
APPEAL FROM

Circuit COURT

Marion COUNTY

TRIAL JUDGE

HON. WM. B. WRIGHT.

Term No. 36. In the Appellate Court of Agenda No.31.
Illinois, Fourth District.
October Term, A. D. 1915.

John C. Kahn and Amanda L. Kahn,	Appellants	Appeal from Marion County Circuit Court.
vs.		
U. W. Easton,	Appellee	

Opinion by Boggs, J.

Appellants filed a bill in chancery in the Marion County Circuit Court to correct an alleged error of the scrivener in drafting a certain warranty deed, dated May 31, 1913, from appellant to appellee for certain property situated in the city of Salem in said County, and to enjoin the prosecution of a suit in covenant in said court brought by appellee against appellants to recover damages for an alleged breach of warranty in said deed. Said cause was heard by the chancellor in open court. The finding was for appellee and the temporary injunction, granted at the time the bill was filed, was dissolved and the bill dismissed for want of equity. From which decree this appeal is prosecuted.

On or about the latter part of May or the early part of June 1913, appellant, John C. Kahn, the owner of certain residence properties in the city of Salem, with certain

vacant lots, a stock of goods, a wagon, horse, etc., entered into a contract with appellee, who was the owner of 226½ acres of farm lands in Jefferson County, for an exchange of said properties. The farm of appellee had a mortgage on it of something like $7800.00, while the properties to be conveyed to appellee by appellant were subject to certain mortgages held by the Pinmundy Building and Loan Association and one C.M.Hull. No mention of said mortgages was made in the contract entered into between said parties. Said contract was very inartistically drawn and was very meager as to the details of the transactions.

The properties to be conveyed by appellant, John C. Hahn, to appellee were conveyed by two deeds, one dated May 31,1913, and the other being dated June 10, 1913. The deed dated May 31, 1913, among other things contained this clause, "This deed is made subject to the taxes for the year 1913, also subject to an incumbrance of forty seven hundred." The question involved in this case is whether or not it was mutually intended by the appellants and appellee that said conveyance from appellants to appellee should have been subject to an incumbrance of Fifty-four hundred dollars instead of forty-seven hundred dollars as stated in said deed. Appellants in their bill aver "that the scriviner in drawing up the said deed, (that is the deed from appellants to appellee) by error and mistake erroneously inserted therein the words 'also subject to an incumbrance of $47[illegible].' when in fact, in accordance with the said agreement of sale and exchange he should have written the same 'also subject to an

vacant lots, a bank on [illegible],

entered into a contract with [illegible]

of 22½ acres of farm lands in [illegible]

exchange of said properties. The [illegible]

mortgage on it of something like [illegible]

properties to be conveyed to [illegible]

[illegible] to certain mortgages held by the [illegible]

an Association and one O.H.Hull. In [illegible]

trigger was made in the contract entered [illegible]

[illegible] said contract was a very [illegible]

and [illegible] very [illegible] — [illegible]

The properties to be conveyed by [illegible]

Dunn, to Angelica were conveyed by [illegible] deeds, one [illegible]

31,1913, and the other being dated June [illegible]

dated [illegible], 1913, among other things mentioned [illegible]

"Does said in some manner in the title [illegible]

was subject to an encumbrance [illegible]

The question involved in this case is whether [illegible]

mutually intended by the appellants and [illegible]

conveyed less acreage to convey than [illegible]

just to an inadvertence or mutual mistake [illegible]

of forty-seven mentioned deeds as stated in [illegible]

[illegible] all over "that the contract [illegible]

by the said deed, (that is the deed from [illegible]

Dunn) by error and mistake erroneously [illegible]

The words also applied to an inadvertence [illegible]

In fact, in accordance with the [illegible] [illegible]

exchange he should have written the same [illegible]

encumbrance in the sum of Five thousand four hundred dollars," The bill filed by appellants seeks to have the deed corrected so as to make it read, subject to an encumbrance of $5400.00 instead of for $4700.00. Appellee, on the other hand contends that there was no error made by the scriviner and that the deed correctly set forth the agreement of the parties, except he says that the mortgages assumed by him on the premises conveyed by said deed in question aggregated the sum of $4800.00 instead of $4700.00.

As stated above the contract entered into between said parties made no reference whatever to the mortgages or the amount of the same, or whether either of said parties was to assume any indebtedness on the properties to be conveyed to them respectively. Whatever agreement said parties had in reference thereto was verbal. The record discloses that said parties were at various times drawing contracts, and it is hard for the court to determine on which of said contracts said parties are relying. They both testified that the contract for the exchange of the properties above mentioned was made on the 30th day of May 1913. However, no contract of that date was offered in evidence. Appellants offered in evidence two contracts which seem to be exact duplicates, except one is dated June 1, 1913, and the other is dated June 11, 1913. Appellants contend that they abandoned the contract of May 30, 1913, and that June 11th is the correct date, while appellee insists that June 1st is the correct date. It is contended by appellants that certain

encumbrance in the sum of five thousand [illegible] dollars." The bill filed by appellants seeks to [illegible] corrected so as to make it read, [illegible] of [illegible]. Instead of [illegible], [illegible], [illegible] hand contends that there was no [illegible] and that the deed correctly [illegible] [illegible] on the premises conveyed by said deed in question [illegible]

[illegible] said parties made no reference whatever to [illegible] the amount of the note, or whether either of said [illegible] was to be made any indebtedness on the [illegible] [illegible] that said parties were at various times dealing [illegible] and it is hard for the court to determine on which of said contracts said parties are relying. They both [illegible] tioned was made on the 30th day of May 1928. [illegible] contract of that date was entered in evidence. [illegible] altered in evidence two contracts which [illegible] tioned, except one is dated June 1, 1928, and [illegible] dated June 11, 1928. Appellants contend that [illegible] the contract of May 3, 1928, and [illegible] correct date, while appellee contends that [illegible] correct date. It is contended by [illegible]

second mortgages which were recorded on the premises conveyed to appellee were to be assumed by him. On the other hand, appellee insists that all of the encumbrances he was to assume on the premises conveyed by the deed in question was the encumbrance held by the Hirmundy Building & Loan Association which he said aggregated forty-eight hundred dollars, but which was mentioned in the deed as $47[illegible].00, but appellee insists that this $1[illegible].00 was taken care of by his assuming an additonal $100.00 in the second deed that was made to him, which deed was dated June 16, 1913. We think the evidence bears him out in this contention. The reason for the second deed being made at a subsequent date to the first deed was that certain buildings that were being erected on saidpremises covered by the second deed had not been completed at the time of the contract.

The evidence in the case is conflicting. Appellants' witnesses testified to the effect that they heard conversations between appellant and appellee in which these second mortgages were mentioned and that it was their understanding that appellee was to assume them, while the witnesses on the part of appellee testified to the effect that nothing was said about appellee assuming these second mortgages. We regard as a strong circumstance in this case the fact that the Notary Public who drafted the deed in question, and who did so at the request of appellants, and at their home, states that he receives his directions with reference to the drafting of the deed from appellant, John C. Kehn, and that the clause with reference to the $4700.00 was put in

second mortgage which were recorded on the [illegible]
to appellee were to be assumed by him. In the [illegible],
appellee insists that all of the assumptions [illegible]
rests on the promise conveyed by the deed [illegible]
was the encumbrance held by the [illegible]
Association which he said appeared only [illegible]
[illegible], but which was mentioned in the deed as [illegible],
appellee insists that this [illegible] was taken [illegible]
his assuming an additional $100.00 in the second deed [illegible]
was made to him, which deed was dated June 16, 1937. [illegible]
think the evidence bears him out in this contention. The
reason for the second deed being made at a subsequent [illegible]
to the first deed was that certain he [illegible] were [illegible]
executed on mortgaged covered by the second deed and not
been completed at the time of the contract.

The evidence in the case is conflicting. [illegible]
[illegible] witnesses testified to the effect that they heard [illegible]
versations between appellant and appellee in which these mo-
and mortgages were mentioned and that it was their under-
standing that appellee was to assume them, while the wit-
nesses on the part of appellee testified to the effect that
nothing was said about appellee assuming these second mort-
gages. We regard as a strong circumstance in this case the
fact that the notary public who drafted the deed in question,
and who did so at the request of appellant, and in their
home, states that he received his directions [illegible]
to the drafting of the deed from appellant, John [illegible],
that the clause with reference to the $[illegible] was not in

there at his instance and direction. Appellants contend, also, that whereas the deed in question to appellee is dated May 31, 1913, that it should be dated June 16, 1913. The notary, however, testified that he has no recollection whatever of dating the deed or his acknowledgment back, and that his recollection is that the acknowledgment which is dated May 31, 1913, is the date on which he drafted the deed and took the acknowledgment.

Appellee is further corroborated, we think, by the fact that possession of the premises conveyed to him was delivered to him by appellants on June 1, 1913, and that he collected the rents from said property from that time on, and that he also took possession of said store on said date.

Appellee's answer to appellants' contention that the first contract was abandoned and that said parties finally settled under the provisions of a contract dated June 16, 1913, is that said parties did have under consideration a somewhat different agreement with reference to certain interest falling due on the mortgage on the farm to be conveyed by appellee to appellant, and with reference to certain other properties known as the "Frisco" properties, held by appellants and which they were negotiating with appellee to take, but that they did not get together on said transaction and that the agreement for the conveyances stood just as theyhad made it under their original contract, and we think that the court was warranted, from the evidence, in adopting appellee's construction of said matter.

After a careful examination of this record we are of the opinion that the trial court was fully warranted in

there at his instance and direction. [illegible],
also, that whereas the deed in question is [illegible]
dated May 31, 1913, but it appears it was [illegible]
The notary, however, testified that he had no recollection
whatever of dating the deed or its acknowledgment [illegible],
that his recollection is that the acknowledgment [illegible]
dated May 31, 1913, is the date on which [illegible]
deed and took the acknowledgment.

[illegible] the fact that possession of the premises conveyed to him
was delivered to him by appellants on June 1, 1913, and that
he collected the rents from said property from that time on,
and that he also took possession of said premises on [illegible].

Appellee's answer to appellants' contention that
the first contract was abandoned and that said [illegible]
ally settled under the provisions of a contract dated [illegible],
1913, is that said parties did have under consideration a
somewhat different agreement with reference to cancelling the
lease falling due on the mortgage on the farm to [illegible]
veyed by appellee to appellant, and with reference to cel-
[illegible] — the "[illegible]"
by appellants and which they were negotiating [illegible]
to take, but that they did not get together on that [illegible]
ation and that the agreement for the conveyance [illegible]
as they had made it under their original contract, [illegible]
that the court was warranted, from the evidence, in [illegible]
ing appellee's construction of said matter.

After a careful examination of [illegible]
of the opinion that the trial court [illegible]

finding that appellants have wholly failed to prove the allegation of their bill. The allegation to the effect that the scriviner who drew the deed erroneously inserted in the clause with reference to the encumbrance against said property, that said encumbrance was $4700.00 instead of $5400.00 is completely refuted by the testimony of the notary who drew the deed, and whose credibility there is no attempt to question. The law is, that in order to justify the reformation of a written instrument upon the ground of mistake, it is necessary that the mistake should be a mutual one and should be proven by clear and convincing evidence, Urvines v. Harrison, 181 Ill.219; Warrick v. Smith, 137 Ill.304. Testing the evidence in this case by the rule laid down by these authorities it is wholly insufficient to support the allegations of the bill.

The action in covenant above referred to was an action brought by appellee to recover from appellant the amount of those second mortgages which appellee had been compelled to pay. We are therefore of the opinion the trial court did right in dissolving the temporary injunction restraining appellee from the prosecution of said suit, and the judgment of said court is affirmed.

Affirmed.

Not to be reported in full.

finding that appellants have wrongly failed to prove the allegation of their bill. The difference in the [illegible] the surviving was drawn the [illegible] in the [illegible] clause with reference to the amendment [illegible] only, that said conveyance [illegible] in completely refuted by the testimony of the [illegible] drawing deed, and whose credibility there is no [illegible] question. The law is, that in order to justify the reformation of a written instrument upon parol evidence, it is necessary that the mistake should be a mutual one and should be proven by clear and convincing evidence, [illegible]

Testing the evidence in this case by the rule laid down by these authorities it is wholly insufficient to support the allegations of the bill.

The action in covenant where referred to for an action brought by appellee to recover [illegible] amount of three second mortgages which appellee had [illegible] paid to Jay. We are [illegible] of the opinion the [illegible] restraining appellee from the prosecution of [illegible], and the judgment of said court is affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 25th *day of April A. D. 1916.*

Clerk of the Appellate Court.

PINION

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the Seventeenth *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Mattie P. Bourland,
Appellee.

vs.

No. 40.

October Term, 1915

Louisville & Nashville Railroad Company,
Appellant.

1991 I.A. 126

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Washington COUNTY

TRIAL JUDGE

HON. LOUIS BERNREUTER.

Term No. 40. In the Appellate Court Agenda No.33.

of Illinois, Fourth District.

October Term A. D. 1915.

Mattie P. Bourland, Appellee,	)	
vs.	)	Appeal from the Circuit Court
Louisville & Nashville Railroad Company, Appellant.	)	of Washington County.

Opinion by Boggs, J.

This was an action on the case in the Circuit Court of Washington County brought by appellee against appellant to recover for injuries alleged to have been received at Ashley, Illinois, on September 18, 1914, by appellee slipping upon a banana skin while she was attempting to board one of the appellant's trains to go to her home at Woodlawn. The declaration, which consisted of two counts, alleged that ~~appellant~~ defendant failed to exercise reasonable care to keep its platform and the steps of its coaches clean, and permitted banana peelings, garbage and refuse to accumulate upon its platform and the steps of one of its coaches, and that ~~appellee~~ plaintiff, while attempting to board the train, was thereby caused to slip and fall, sustaining a severe nervous shock, laceration and strain of the muscles and ligaments, and that she was permanently injured. ~~A plea of the general issue was filed~~

Term No. 60. In the Appellate Court
of Illinois, Fourth District.
October Term A. D. 1915.

Willis I. Crawford, Appellee, vs. Louisville & Nashville Railroad Company, Appellant.	Appeal from the Circuit Court of Washington County.

Opinion of Court.

[illegible]

[illegible]

upon which the case was tried, resulting in a verdict for appellee for One Thousand Dollars. Motion for a trial and in arrest of judgment were overruled, and appellant prosecutes this appeal.

The train which appellee attempted to board was an accommodation train consisting of a baggage car, smoker and ladies' car, starting from St. Louis and reaching Ashley about eight o'clock at night. When appellee reached the second or third step of the car she slipped and fell in a heap to the right and somewhat backward, but not off of the steps of the car. The flagman picked her up from the steps and carried her over to a truck standing on the platform. Appellee was later carried to the house of a friend in Ashley where she remained for two weeks, and was then taken to her home in Woodlawn, where she was confined to her bed for some four weeks, and was unable up to the time of the trial to walk without assistance. The evidence tended to prove that she suffered pain in her back and pelvic organs and hip, whenever she was on her feet for any length of time or received any jolt or jar.

Appellants first contention is that the verdict of the jury is against the manifest weight of the evidence. Appellee insists that in boarding appellant's train at Ashley, she unavoidably stepped on a banana peel which was lying on the third step of the platform at the front end of the ladies coach. The witnesses for appellee, some five or six in number testified that when appellant's train

stopped at Ashley no one got off of the ladies' coach, and that ~~appellee~~ plaintiff was the first person to attempt to board the train. ~~Appellee~~ Plaintiff, herself, testified to the same effect, and also that when she attempted to board the train she stepped on a banana peel lying on the third step of the platform in the front of the ladies' coach and slipped and fell as above mentioned. ~~Appellee~~ Plaintiff further testified that she did not see this banana peel until just as she was placing her foot on said step and that she did not have time to change her footing and that by reason thereof she fell and sustained the injury shown by the evidence.

On the other hand the witnesses for ~~appellant~~ testified that some two or three persons got off the ladies coach at Ashley, and also that two or three persons preceded appellee in boarding the train. The flagman testified that as he came out of the ladies coah he examined the steps of the platform in front of said coach and that he observed nothing on the same, "I saw nothing on the steps as I went down." He ~~is~~ was corroborated by the conductor, who also testified that he observed the steps and saw nothing and ~~is~~ was further corroborated by one of the passengers who made an examination of the steps sometime later, but while the train was standing at Ashley. ~~Appellant~~ Defendant's theory ~~is~~ that ~~appellee~~ plaintiff was wearing low shoes with high heels and that her heel turned when she was boarding the train and that, that was the cause of her falling, instead of stepping on a banana peeling as testified to by appellee.

No one other than ~~appellee~~ plaintiff testified to seeing the

banana peeling on the step of the car platform. However, two of the witnesses for ~~appellee~~ plaintiff, Mr. and Mrs. Vaughn who were on the platform at Ashley when the train pulled in testified that after ~~appellee~~ plaintiff fell they noticed a banana peeling on the station platform near the front platform of the ladies coach. ~~In other words, they saw this banana peeling on the station platform right where appellee fell.~~ ~~Appellant~~ Defendant further insists this is corroborative of its theory of the case that no damp spot appeared on the steps of the car and that there was no damp spot on the sole of appellee's shoe.

We think it should be observed that appellee's testimony to the effect that there was a banana peeling on the platform of the car, and the evidence of Mr. and Mrs. Vaughn, witnesses for appellee, to the effect that there was a banana peeling near the step on the platform of the station is positive and direct, while the evidence of appellant's witnesses that they observed nothing on the platform of the car or at the station is negative in character. We think that the testimony of the flagman as to the observations made by him when he got off the car were simply the usual observations that he would make at any station, and would not be as reliable as the positive testimony of the other witnesses. It might, too, be observed that the contention of appellant, that appellee was caused to fall by reason of her ankle turning was a mere inference, as there is no evidence whatever to support it in the record. We have carefully examined this evidence and we think

that if the jury believed the witnesses of appellee they were warranted in finding that there was a banana peeling on the platform of the car and that it was the proximate cause of appellee falling and receiving the injury shown by the evidence.

It is next contended by appellant that even though it be admitted that there was a banana peeling on the platform of the car as testified to by appellee, and that she slipped and fell thereon as detailed by her, that in the absence of further proof to the effect that appellant knew the banana peeling was there or that it had been there long enough that appellant, by the use of ordinary care should have known of its being there, appellee would not be entitled to recover. This question is raised by the motion at the close of appellee's evidence and again at the close of all the evidence to instruct the jury to find the issues for appellant. Several cases are cited by appellant from other States which tend to support its theory. No case, however, in support of this theory is cited from Illinois. The law, as we understand it, in this state is to the effect that when a person becomes a passenger of a Railroad Company, it then becomes the duty of said Railroad Company to use the highest degree of care for the protection of said passenger, consistent with the practical operation of its road. Lake St. El.R.R.Co. v. Burgess, 220 Ill.628; Chicago City R.R.Co. v. Shreve, 226 Ill.530; Lapin v. N.W. El. R. Co. 162 App. 296.

With reference to the question as to whether or

that if the jury believed the witnesses of appellee they were warranted in finding that there was a human peeling on the platform of the car and that it was proximate cause of appellee falling and receiving the injury shown by the evidence.

It is next contended by appellant that even though it be admitted that there was a banana peeling on the platform of the car as testified to by appellee, and that she slipped and fell thereon as detailed by her, even in the absence of further proof to the effect that appellant knew the banana peeling was there or that it had been there long enough that appellant, by the use of ordinary care should have known of its being there, appellee would not be entitled to recover. This question is raised by the motion at the close of appellee's evidence and again at the close of all the evidence to instruct the jury to find the issues for appellant. Several cases are cited by appellant from other States which tend to support its theory. We cited, however, in support of this theory in cited from Illinois. The law, as we understand it, in this state is to the effect that when a person becomes a passenger of a railroad company, it then becomes the duty of said railroad company to use the highest degree of care for the protection of said passenger, consistent with the practical operation of the road. [illegible] Chicago City R.R.Co. v. Greve, 208 Ill.[illegible]; [illegible] 4 I.A. App. Co. 162 App. 220.

With reference to the question [illegible] however or

not Appellant through its servants knew or should have known that said banana peeling was on the steps of said car as contended by appellee it should be observed that the Station at Ashley ~~is~~ was on the north side of ~~Appellant's~~ defendant's railroad track, and ~~that~~ the next five stations west of Ashley ~~are~~ were on the south side of ~~appellant's~~ defendant's track; ~~that~~ and the last station on the north side of ~~appellant's~~ defendant's track before arriving at Ashley is Wascoutah, so the conclusion might easily be drawn by the jury that the brakeman and other employees of appellant in charge of said train had plenty of opportunity to observe the condition of the platform of said car and should have removed any foreign substance thereon before allowing passengers to board said train. This, the flagman, testified he did, but the jury evidently believed the witnesses of appellee rather than those of appellant on this question.

It is next contended by appellant that the verdict of the jury is excessive. Appellant insists that the evidence in this case tended to prove that appellee was not injured to the extent claimed by her and that there was more or less feigning by her of pain and suffering, ~~which did not in fact exist.~~ The evidence tended to show that appellee was more or less of a nervous temperament, and that up to some two years prior to this accident she had been in ill health, but that for two years preceding the accident her health had been good and that she had done the house work without assistance ~~of~~ for a family of four; that subsequent to the accident she had been unable for six weeks to leave

her bed and that she had not been able, up to the time of the trial, some four or six months after the accident, to walk without assistance. The only evidence to dispute ~~appellee~~ plaintiff in this record were the witnesses, neighbors of ~~appellee~~ plaintiff, who testified that they had observed her doing her house work, and one of them testified that they saw her get into a buggy unassisted and had seen her sweep the walks in front of her house. Two physicians examined ~~appellee~~ plaintiff at the time of the injury, one called at the instance of appellee and the other being the physician of ~~appellant's~~ defendant's railroad, both of whom found an injury on ~~appellee's~~ plaintiff's hip and it was thought by them when the injury first occurred that one of the lower limbs of ~~appellee~~ plaintiff was some two inches shorter than the other, but the railroad physician afterwards became of the opinion on measurement that this was not true. ~~Appellee's~~ Plaintiff's physician who had charge of her after the first examination testified that following the injury at Ashley, ~~appellee~~ plaintiff suffered disorders of the pelvic organs and the womb, that one of the fingers of ~~appellee~~ plaintiff was injured at the time of the accident; that it festered and a part of the bone thereafter became detached and sloughed off.

The jury heard all of these witnesses testify and it is for them to say in cases of this character what damages have been suffered and unless the reviewing court can see that the finding of the jury, with reference to damages, is against the manifest weight of the evidence, their finding should not be disturbed. We are unable to say that the jury's finding is against the manifest weight of the evidence, or

her bed and that she had not been able, up to the time of the trial, some four or six months after the accident, to walk without assistance. The only evidence to contradict appellee in this regard were two witnesses, relatives of appellee, who testified that they had observed [illegible] house work, and one of them testified that [illegible] into a buggy unassisted and had seen her [illegible] the time of the injury, one called as the [illegible] and the other being the physician of appellant's [illegible], both of whom found an injury on appellee's [illegible] by them when the injury first occurred [illegible] of the lower limbs of appellee was some [illegible] than the other, but the railroad physician [illegible] cause of the opinion on measurement that [illegible] appellee's physician who had charge of her after the [illegible] examination testified that following the injury [illegible] that one of the limbs of appellee was [illegible]

The jury heard all of these witnesses [illegible] it is for them to say in cases of this character [illegible] have been suffered and unless the reviewing court [illegible] that the finding of the jury, with reference [illegible] against the manifest weight of the evidence, [illegible] should not be disturbed. We are unable [illegible] the jury's finding is against the manifest weight of the evidence. It

that the verdict is so excessive as to require a reversal on that account.

Appellant next contends that the court erred in giving the instruction given on behalf of appellee, being the only instruction offered or given on her behalf. This instruction was confined solely to the measure of damages appellee was entitled to recover, providing that under the instructions of the court the jury should find the instructions of the court the jury should find appellant guilty. We have examined the instructions and find that it is the ordinary and usual instruction given by plaintiff on the measure of damages, and that the same has been approved by the Appellate and Supreme courts. The only difficulty with reference to this instruction in our judgment is that one of the elements of damages contained therein is the "loss of time of appellee." At common law the husband only could recover for the loss of services of the wife, and under the different statutes passed in this state, enlarging the rights of the wife, this rule has not been entirely abrogated. However, we do not believe that the error is of sufficient importance, in view of the testimony in the case, to require a reversal. In West Chicago City R.R.Co. v. Carr, 170 Ill. 478, and in Chicago, Milwaukee Ele. Ry. Co. v. Krempel, 103 App. 3, both of which cases involved the right of a wife to recover for loss of time during coverture, instructions of practically the same effect while not wholly approved by the Courts, it was held not to be error to give the same.

that the verdict is so excessive as to require a reversal on that account.

Appellant's contention that the court erred in giving the instruction given at request of appellee, being the only instruction offered or given on her behalf. This instruction was confined solely to the measure of damages appellee was entitled to recover, providing that under the instructions of the court the jury should find for the instructions of the court the jury should find accordingly, we have examined the instructions and find that in the ordinary and usual instruction given by plaintiff in the measure of damages, and that the same has been approved by the Appellate and Supreme courts. The only difficulty with reference to this instruction in our judgment is that the of the elements of damages contained therein is the "loss of time of appellee." At common law the husband only could recover for the loss of services of the wife, and under the [illegible] of the wife, this rule has not been entirely eliminated. However, we do not believe that the error is of sufficient importance, in view of the testimony in the case, to warrant a reversal. In West Chicago City R.R.Co. v. [illegible], 172 Ill. 478, and in Chicago, Milwaukee Ins. Co. v. [illegible], 108 App. 3, both of which cases involved the [illegible] wife to recover for loss of time during coverture, instructions approved by the Courts, it was held not to be error to give the same.

It is next contended by appellant that the court erred in refusing the thirteenth, sixteenth and twenty-fourth instructions offered by it on the trial of said cause. The court gave one instruction for appellee and twenty-four instructions for appellant. In fact, gave all the instructions offered by appellant with the exception of three. The substance of appellant's refused instructions thirteen and sixteen, so far as material or proper were covered by the instructions given and there was no error in refusing said instructions. Appellant's refused instruction number twenty-four was quite lengthy and involved, and was calculated to mislead the jury and there was no error in refusing the same.

Finding no reversible error in the record the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported in full.

It is next contended by appellant that the court erred in refusing the thirteenth, eighteenth and twenty-fourth instructions offered by it on the trial of said cause. The court gave one instruction for appellee and [illegible] instruction for appellee [illegible], gave all the instructions offered by appellant with the exception of three. The substance of appellant's refused instructions thirteen and sixteen, so far as material or proper were covered by the instructions given and there was no error in refusing said instructions. Appellant's refused instruction number twenty-four [illegible] and involved, and was calculated to [illegible] the jury and there was no error in refusing the same.

Finding no reversible error in the record the judgment of the trial court will be affirmed.

[illegible]

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 24 *day of April A. D. 1916.*

Clerk of the Appellate Court.

PINION

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the Seventeenth *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

John C. Glascock, a Minor by
M. C. Glascock, his next friend,
Appellee.

vs.

No. 48.

October Term, 1915

George Gerold,
Appellant.

~~ERROR TO~~
APPEAL FROM

Circuit COURT

St. Clair COUNTY

TRIAL JUDGE

HON. GEORGE A. CROW.

Term No. 46. In the Appellate Court Agenda No. 42

of Illinois, Fourth District.

October Term A. D. 1915.

John C. Glascock, a Minor, by M. C. Glascock, his next friend, Appellee	Appeal from the Circuit Court of St. Clair County.
vs.	
George Gerold, Appellant.	

Opinion by Boggs, J.

Appellee, a minor by next friend recovered a judgment in the Circuit Court of East St. Louis, against appellant in an action on the case, for Eight hundred dollars, from which judgment this appeal is prosecuted.

~~The facts disclosed by the record are that appellant was~~ Defendant was the owner of a flat roofed two story brick building used for ware-house purposes, located on 13th street in the city of East St. Louis. Prior to the injury in question there had been another brick building adjoining this building on the rear, which had burned leaving a portion of its side wall standing, adjoining ~~the appellant's~~ defendant's warehouse. There was also a portion of the wall of the burned building extending west from the north wall of ~~appellant's~~ defendant's building. These broken walls extended down in a broken standing condition from the top of ~~appellant's~~ defendant's building to the ground. On the date in question ~~appellee~~ plaintiff who was then thirteen years

[illegible] 15. In the Appellate Court
of Illinois, Fourth District.
October Term A. D. 1915.

John C. Glancock, a
minor, by [illegible] C. Glancock,
his next friend,
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]

Appeal from the Circuit
Court of [illegible]

Opinion by [illegible], J.

[illegible], a minor by [illegible] recovered a judgment in the Circuit Court of [illegible], [illegible] last in an action on the case, for eight hundred dollars, from which judgment this appeal is prosecuted.

[illegible] the owner of a flat roofed two story brick building, used for wine-house purposes, located on 15th street in the city of [illegible]. Prior to the injury in question there was also a portion of the wall of the [illegible] adjoining said [illegible] building to the ground. [illegible] from the top of [illegible]'s building to the ground. [illegible]

of age in company with two other boys of about the same age had climbed up the broken walls of the burned building and had got on top of the warehouse in questionand were looking for pigeons and eggs. ~~Appellant~~ Defendant saw them and exclaimed, "I have the boys that have been stealing my pigeons," Thereupon the boys tried tomake their escape from the building. ~~Appellee~~ Plaintiff testified that as he was starting down backward on this broken wall, ~~appellant~~ defendant threw a brick and struck him on the shoulder; that he fell from the wall to the ground being about twenty feet and broke the tibia or large bone of his leg below the knee. The injury received by ~~appellee~~ plaintiff kept him in the hospital for nineteen days and confined him to his home for about four weeks. After he started to school, he still had to use crutches for some considerable time. The evidence was very conflicting.

The grounds relied on by appellant for a reversal of this cause are, first, that the verdict is not supported by the evidence; second, that the verdict is excessive, and third, that the court erred in giving an instruction offered by appellee.

The evidence in this case was very conflicting. No one testified definitely that appellant threw a brick at appellee and struck him except appellee himself. However, the two boys who were with appellee on the building testified that they saw appellant have a brick in his hand and saw him draw back and make a motion as if to throw the same. They further testified that they did not know at whom appellant intended to throw and so dodged and did not see whether he threw the brick or not. Immediately, however, after this,

of age in company with the other boys of [illegible] age had climbed up the broken walls of the building and had got on top of the warehouse in the neighborhood [illegible] looking for pigeons and [illegible] exclaimed, "I have the boys that have been stealing my pigeons." Thereupon the boys tried to make their way from the building. Appellee testified that as he was stooping down beneath on this broken wall, [illegible] there brick and struck him on the shoulder; that he fell from the wall to the ground being about twenty feet and broke his tibia or large bone of his leg below the knee. The injury received by appellee kept him in the hospital for nineteen days and confined him to his home for about four weeks. When he started to school, he still had to use crutches for some considerable time.

The grounds relied on by appellant for a reversal of this case are, first, that the verdict is not supported by the evidence; second, that the verdict is excessive; and third, that the court erred in giving an instruction asked by appellee.

The evidence in this case was very conflicting.

No one testified definitely that appellant threw [illegible] at appellee and struck him except appellee himself. However, the two boys who were with appellee on the building testified that they saw appellant have a brick in his hand and he had drawn back and made a motion as if to throw the brick. They further testified that they did not know or know [illegible] intended to throw and so looked and did not see [illegible] threw the brick or not. Inasmuch as, however, [illegible] this,

they saw appellee lying on the ground with his leg broken as above mentioned. A colored woman who lived near this building, testified that she saw appellant have a brick in his hands and saw appellee coming down on the broken wall, but did not see appellant throw the brick. However, she testified she was looking at a landlord's notice to quit, given her by appellant about that time. On the other hand, appellant testified that he did not throw the brick; that he told the boys not to come down, that he said he would get a ladder to assist them in getting down. However, the evidence fails to show that he made any attempt whatever to procure a ladder or to assist the boys in any way to reach the ground. A Mr. Swartz, who had been previously called by appellant to assist him in watching the boys says that appellant threw no brick so far as he observed, and a Mr. Irwin also testified that he saw a part of the transaction but he did not see appellant throw any brick.

The evidence discloses that appellant was considerably excited when he found the boys; that he stated that he had found the boys who had been stealing his pigeons and that he directed the man, Swartz, to notify the police. Appellant denied this but the evidence shows that the police came and there is no other explanation as to why they came except the explanation given by appellee's witnesses. The chief of police testified that appellant was very angry because the other boys were not held at the police station. Appellant denied this, but we think the evidence preponderates in favor of the statement made by the policeman. Appellee also testified

that when he fell and broke his leg that he requested appellant to take him to his mother and that appellant remarked that he would not care if he had broken both of his d-- legs. Appellee is corroborated in this statement by others who were present at that time. These matters are only important as tending to show the frame of mind appellant was in at the time and as throwing some light on the weight and credibility to be given to his testimony.

In the condition of the record it was for the jury to determine what the evidence proved and there being no serious error in the rulings of the court on the evidence we are inclined to the opinion that the verdict of the jury should not be disturbed on the ground that it was against the manifest weight of the evidence.

It is next contended by appellant that the verdict is excessive. We have examined the evidence in this case and are of the opinion that the court would not be warranted in holding this verdict to be excessive even though only actual damages could be recovered. The evidence tended to show ~~appellee~~ plaintiff sustained a very serious injury. The doctors testified that the tibia was fractured and that part of the bone was removed. They further testified that in order to secure a proper union of the fractured bone they inserted in the canal of the bone a peg made of wood to assist in holding the bone in place. They also were compelled to tie together the broken ends of the bone with a wire thread. The evidence further disclosed that at the time of the trial the foot of the injured limb was more or less thrown outward

that when he left and broke his leg [illegible]
not to take him to his [illegible]
he would not care if he [illegible]
negligence is concerned in [illegible]
were present at that time. [illegible]
an tending to show the [illegible]
time and as throwing some light on the [illegible]
to be given to his testimony.

In the condition of the record it [illegible]
to determine what the evidence proved [illegible]
serious error in the ruling of the court on the [illegible]
are inclined to the opinion that the verdict of the jury
should not be disturbed on the ground that it was against
the manifest weight of the evidence.

It is next contended by appellant that the verdict
is excessive. We have examined the evidence in this [illegible]
are of the opinion that the court would not be warranted in
holding this verdict to be excessive even [illegible] only actual
damage could be recovered. The evidence tends to show
[illegible] sustained a very serious injury. The [illegible]
tified that the tibia was fractured and that part of the
bone was removed. They further testified that in order to
secure a proper union of the fractured bone they inserted
in the end of the bone a peg made of wood to assist in
holding the bone in place. They also [illegible] to tie
together the broken ends of the bone [illegible]
The evidence further discloses that [illegible]
the loss of his injured leg [illegible]

and that ~~appellee~~ plaintiff could not stand straight on his legs. The doctors were of the opinion, however, that he would ultimately recover from this defect. We also hold that if appellant threw the brick in question and struck appellee, under the circumstances testified to by appellee, the jury would be warranted in awarding vindictative damages. In our judgment the verdict was not excessive.

Only one instruction was given on behalf of appellee. This instruction informed the jury that in order for appellee to recover it would only be necessary that the evidence in proof of his declaration should but slightly preponderate in his favor. Appellant contends that the evidence of appellee, if believed, tends to prove that appellant was guilty of a felony, that is, that he assaulted appellee with a deadly weapon, and that, therefore, under the authorities, it would be necessary for appellee to prove his case beyond a reasonable doubt before he would be entitled to recover. We do not believe that the authorities cited by appellant support his contention.

In the case of Grimes v. Milliary, 150 Ill. 141, cited by appellant, the court at page 146 says: "It does not follow that because an element may have entered into the act which would have rendered it indictable as a crime, but which is not alleged or necessary to be proved to authorize a recovery in the civil action, the proof must be made beyond a reasonable doubt. Citing, Riggs v. Powell, 142 Ill.453."

In Miller v. Beltzhaser, 78 Ill. 362, the court at

[illegible] could not stand straight on the [illegible]. The doctors were of the opinion, however, that he would ultimately recover from this disease. [illegible] it appeared that the shock in question had caused appellee, under the circumstances testified to by witnesses, the jury would be warranted in awarding vindictive damages. In our judgment the verdict was not excessive.

Only one instruction was given on behalf of appellee. This instruction informed the jury that in order for appellee to recover it would only be necessary that the evidence in proof of his declaration should not clearly preponderate in the favor [illegible] the evidence of appellee, it believed, tended to prove that appellant was guilty of a felony, that is, that he assaulted appellee with a deadly weapon, and that, therefore, under the authorities, it would be necessary for appellee to prove his case beyond a reasonable doubt before he would be entitled to recover. We do not believe that the instruction stated by appellant supports his contention.

In the case of Grimes v. Hilliary, 188 Ill. 349, cited by appellant, the court at page 352 says: "It does not follow that because an element may have entered into the act which would have rendered it indictable as a crime, but which is not alleged or necessary to be proved to authorize a recovery in the civil action, the proof must be made beyond a reasonable doubt." Follows [illegible] v. [illegible], 147 Ill. 544.

In Miller v. Hollmann, 76 Ill. App. 6, the court at

page 305 says, "This is not, however, a criminal or penal action, but is merely a civil action, brought to recover damages for a personal injury. The judgment involves neither the life nor liberty of the defendant, and we are aware of no authority that would require the plaintiff to establish her cause of action by more than a preponderance of the evidence. The rule that obtains in criminal cases has no application to this."

The declaration in this case does not allege facts which in effect charge appellant with a felony. The facts as alleged in the several counts charge a simple assault or an assault and battery, which offenses are mere misdemeanors and do not, when arising in a civil case, require the degree or proof contended for by appellant. A complete answer, however, to appellant's contention so far as this particular case is concerned is that he, himself, in the instructions presented by him to the court and which were given at his request, only required the plaintiff to prove his case by a preponderance of the evidence. Having, himself, fixed this degree of proof, he cannot now insist on a greater.

Appellant also insists that this instruction is erroneous for the reason that the word "preponderates" is modified by the word "slightly". We do not think this point is well taken as this instruction has been substantially approved both by the Supreme and Appellate courts. (Chicago City Ry. Co. v. Bundy, 210 Ill.39; Taylor v. Nelsing, 164 Ill.331; Young v. City of Fairfield, 173 App.Ill.)

page 305 says, "This is not, however, a criminal or penal action, but is merely a civil action, arising in rem or damages for a personal injury. The judgment involves neither the life nor liberty of the defendant, and we are aware of no authority that would require the plaintiff to establish his cause of action by more than a preponderance of the evidence. The rule that obtains in criminal cases has no application to this."

The declaration in this case does not allege that [illegible] is crime [illegible] as defined in the penal code [illegible] or an assault and battery, which offenses are misdemeanors and do not, when arising in a civil case, require the aspect or proof peculiar to a criminal [illegible] manner. Hence, to application's contention [illegible] particular case is concerned is that he, himself, in the instructions presented by him to the court and which were given at his request, only required the plaintiff to prove his case by a preponderance of the evidence. Having, himself, fixed this degree of proof, he cannot now insist on a greater.

Appellant also insists that this instruction is erroneous for the reason that the word "preponderance" is modified by the word "slightly". We do not think this is well taken as this instruction has been substantially approved both by the Supreme and Appellate courts. (Illinois City Ry. Co. v. Hundy, 210 Ill.39; [illegible] v. [illegible], [illegible] Ill.383; Young v. City of Aurora, 172 [illegible].)

In Young v. City of Fairfield, supra, the court at page 318 in discussing an instruction of this character, says: "Instruction No. 12, is also criticised because it says, 'If the plaintiff's evidence preponderates but slightly it would be sufficient, etc.' This instruction was approved by the Supreme Court in the case of of Hanchett v. Haas, 219 Ill. 548, and in other cases."

Appellant assigns errors on the refusal of certain instructions offered on its behalf, but fails to argue these refused instructions in his brief and under the rules of this court this assignment of error is abandoned.

Finding no reversible error in this record the judgment of the trial court is affirmed.

Judgment affirmed.

Not to be reported in full.

In Young v. City of Fairfield, supra, [illegible] at page 318 in discussing an instruction [illegible] says: "Instruction No. 19, in so erroneously [illegible] says, 'If the plaintiff's evidence [illegible] it would be sufficient, etc.' [illegible] proved by the supreme court in the case of [illegible] Shaw, 219 Ill. 548, and in other cases.

Appellant assigns errors on the refusal of certain instructions offered on its behalf, but fails to [illegible] these refused instructions in his brief and under the [illegible] of this court this assignment of error is abandoned.

Finding no reversible error in the record, the judgment of the trial court is affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 25th *day of April A. D. 1916.*

Clerk of the Appellate Court.

PINION

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the Seventeenth *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

199 I.A. 137

Harvey S. Converse,
Appellee.

vs.

No. 50,
October Term, 1915

Independent Breweries Co.,
Appellant.

ERROR TO
APPEAL FROM

City COURT

East St. Louis COUNTY

TRIAL JUDGE

HON. R. H. FLANNIGAN.

Term No. 50. In the Appellate Court Agenda No.48.

of Illinois, Fourth District.

October Term, A. D. 1915.

Harvey S. Converse, Appellee. vs. Independent Breweries Co., Appellant.	Appeal from the City Court of East St. Louis.

Opinion by Boggs, J.

This is an appeal prosecuted by appellant to reverse a decree of the city Court of East St. Louis, enjoining appellant from prosecuting a certain forcible entry and detainer suit against appellee and the Lemp Brewing Co., to obtain possession of a certain building owned by appellee in the City of East St. Louis, and to cancel a purported lease on saidpremises given by appellee to appellant.

Appellee, who was the owner of a two story brick building located at 3232-3234 on State street in the city of East St. Louis, the lower part of which was used for a saloon and the upper part as a residence property, had on February 14, 1914, in pursuance of an option given to the Lemp Brewing Co. dated Feb. 5, 1914, executed a lease to said Lemp Brewing Co. on said building for a term of five years beginning March 1, 1914. It is contended by appellant that appellee had executed a lease to it on the same building

for a period of three years beginning March 1, 1914, which said lease appellant contends was executed on the 11th day of February, 3 days prior to the lease given to the Hemp Brewing Co. Appellant brought forcible entry and detainer proceedings before a Justice of the Peace of East St.Louis to obtain possession of said property. Before the hearing appellee filed a bill in the City Court of East St.Louis to enjoin the prosecution of said forcible entry and detainer suit, and to rescind and set aside the purported lease on said premises held by appellant on the ground that the signatures to said lease was obtained by fraud and deceit.

Afterwards, on the 21st day of May, 1914 by leave of Court appellee filed an amended bill, to which bill appellant filed its answer and said cause was referred to a special master. The evidence was taken and the master found that the lease of appellant was a valid and binding obligation on the part of appellee, and that there was no fraud or misrepresentation practiced by the appellant in securing the same. Exceptions were sustained to the master's report, and appellee was permitted to file a second amended bill, to which the answer and replication then on file were extended.

The ~~second amended bill~~ as amended alleged in substance that ~~appellee~~ plaintiff was the owner of the property sought to be leased, and that on the 11th day of February, 1914, Walter Schott, agent of ~~appellant~~ defendant, knowing that ~~appellee~~ plaintiff had on February 6, 1914, given an option to the Hemp Brewing Company for a lease on said premises, presented ~~appellee~~ plaintiff with a lease with blanks unfilled, and told ~~appellee~~ plaintiff if he would sign said

for a period of three years beginning March 1, 1924, which
said lease appellant contends was surrendered on the 15th day
of February, 2 days prior to the defendant's [illegible]
[illegible] Co. Appellant brought [illegible]
proceeding before a Justice of the [illegible]
to obtain possession of said property. Before the hearing
appellee filed a bill in the City Court of [illegible] to
enjoin the prosecution of said Forcible entry and detainer
suit, and to rescind and set aside the asserted lease on
said premises held by appellant on the ground that the signa-
tures to said lease were obtained by fraud and deceit.

Afterwards, on the 23rd day of [illegible], 1924 by leave
of Court appellee filed an amended bill, to which bill ap-
pellant filed its answer and said cause was referred to a
special master. The evidence was taken and the master found
[illegible] the lease of appellant was a valid and binding obliga-
tion on the part of appellee, and that there was no ground
for misrepresentation practiced by the appellant in securing
the same. Exceptions were sustained to the master's report,
and [illegible] was [illegible] [illegible]
which the answer and replication then on file were [illegible]

The amended bill alleged in substance that
appellee was the owner of the property sought to be leased,
and that on the 11th day of February, 1924, [illegible] owner,
[illegible] knowing that [illegible] had on January 5,
1924, given an option to the [illegible] [illegible]
lease on said premises, [illegible] [illegible]
[illegible] and told [illegible] [illegible] said

blank lease, that in case the Lemp Brewing Company did not take the premises that ~~appellant~~ defendant would fill out the blanks and return said lease to ~~appellee~~ plaintiff for his approval and that ~~appellant~~ defendant would rent said premises for three years from March 1, 1914, with privilege of two years more; that ~~appellee~~ plaintiff told Schott that he would sign said lease on that consideration; and that if the Lemp Brewing Company did take said premises, then the said lease was not to become operative; that ~~appellant~~ defendant did not follow his agreement, but in defiance of said conditions immediately filled up the blank form of lease and sent same to ~~appellee~~ plaintiff; that ~~appellee~~ plaintiff thereupon returned said lease to ~~appellant~~ defendant with notation "Your lease not up to my approval"; that there was no consideration for the signing of said lease and that whatever rights appellant has under the lease, if any, ~~is~~ was subject to the rights of The Lemp Brewing Company. Said bill prayed that ~~appellant~~ defendant be restrained from prosecution of its forible entry and detainer suit, and that said lease be declared null and void and cancelled.]

The Court entered a decree sustaining the exceptions to the Master's report and found that the said lease so made by appellee to appellant on February 11, 1914, was made with the understanding that it was not to become operative if the Lemp Brewing Company took said premises; that appellant filled out said blank lease immediately after its execution; that appellee never authorized this to be done; that there was no consideration for said lease, and

blank lease, that in case the Tong Leasing Company [illegible]
take the premises that [illegible]
and return said lease to [illegible] for [illegible] and that
appellant would sent said premises for [illegible] years from
March 1, 1917, with privilege of two years more; [illegible]
[illegible] told Abbott that he would sign said lease on that
consideration; and that if the Tong Leasing Company [illegible] take
said premises, then the said lease was to [illegible] operative;
that appellant did not [illegible] the premises, but in
defiance of said conditions broadly filled up the blank
form of lease and sent same to appellee; that appellee there-
upon returned said lease to [illegible]
lease not up to my approval"; that there was no consideration
for the signing of said lease and that whatever rights ap-
pellant has under the lease, if any, are subject to the rights
of the Tong Leasing Company. [illegible] praying that [illegible]
have be mandamus issued [illegible] in the Municipal Court
and defendant suit, and that [illegible]
void and cancelled.

The Court entered a decree sustaining the exceptions
to the master's report and found that the [illegible]
made [illegible] to appellant on February 27, 1917, was
made with the understanding that it was not to
be operative if the Tong Leasing Company took said lease;
that appellant [illegible] to
be done; that there was no [illegible] said lease, and

that the same was a fraud upon appellee. The decree enjoined appellant from prosecuting its suit and declared said lease to appellant null and void and ordered the same cancelled.

While the evidence is more or less conflicting, we are of the opinion that the finding and decree of the court, to the effect that said lease to appellant was signed by appellee on condition that it was not to become effective if the Temp Brewing Co. elected to lease said premises under its option which did not expire until March 1, 1914, is supported by a preponderance of the evidence. The evidence offered by appellant on this controverted question is confined to two witnesses, William Schott and Frank Griesedieck, both of whom are representatives of ~~appellant~~ defendant, ~~these witnesses both~~ testified to the effect that the lease in question signed, by ~~appellant~~ defendant and ~~appellee~~ plaintiff was to be binding as soon as executed by said parties, and that no condition whatever was attached to the delivery of the same by appellee to William Schott, other than that Schott, was to have the lease signed by the officers of ~~appellant~~ defendant, and when signed, a copy of said lease was to be mailed to ~~appellee~~ plaintiff. On the other hand, ~~appellee~~ plaintiff testified specifically that both copies of said lease were signed by him in blank and were delivered by him to the witness, Schott, upon the express condition that said lease was not to take effect, provided the Temp Brewing Co. elect to rent said premises under its said option. ~~Appel~~ Plaintiff corroborated by the witnesses Thomas Sanders and C. Bloomer. Sanders testified that he was in ~~appell~~ plaintiff

that the same was a fraud upon appellee. The court sustained appellant's demurrer, and appellee declined to plead further, whereupon the court entered a judgment for appellant, and appellee prosecuted an appeal to the Court of Civil Appeals, where the judgment was reversed and the cause remanded.

While the evidence is more or less conflicting, we are of the opinion that the finding and decree of the court, to the effect that said lease to appellee was signed by appellee on condition that it was not to become effective if the Lamb Drilling Co. elected to lease said premises under its option which did not expire until March 1, 1914, is supported by a preponderance of the evidence. The evidence tending to show that the lease in question was signed by appellee and appellant was to be binding as soon as executed by said parties, and that no condition whatever was attached to the delivery of the same by appellee to William Abbott, which leaves that Abbott, was to have the lease signed by the [illegible] mailed to appellee. On the other hand, appellee testified specifically that both copies of said lease were signed by him in blank and were delivered by him to [illegible] Abbott, upon the express condition that said lease was not to take effect, provided the Lamb Co. [illegible] to rent said premises under its option, [illegible] corroborated by the witnesses [illegible] Abbott. Numerous letters identified by the witnesses [illegible]

of business when the witness Schott representing the Independent Breweries Co. came to see ~~appellee~~ plaintiff about the leasing of said premises and that Schott said to ~~appellee~~ plaintiff "You sign this (referring to said lease) and if the Lemp Brewing Co. don't take, it we will." "Mr. Schott told him to sign it, sign the blank. I heard him say that. He said if the Lemp Brewing Co. don't want to take it, we will." Curtis Bloomer testified. "I was at 33rd and State, at Mr. Converse's; I know of Mr. Schott; I saw Mr. Schott and Mr. Converse in the basement; . . . . I was there and they were talking about the lease business with the Brewery and Mr. Converse says, well, what about it? Well, he says, we will just have to wait until the outcome of the Brewery and if they don't take it we will." The evidence further disclosed that ~~appellant~~ defendant through its agents knew of the option held by the Lemp Brewing Co. and that they had this knowledge on February 11, 1914, at the time the purported lease between it and ~~appellee~~ plaintiff was signed.

D. A. Prindable, a witness called on behalf of appellee testified that Schott called me up, he is the representative of the brewery. . . . I told him we had an option on it (referring to the building). L. C. Smith, a witness for appellee testified "Mr. Schott, the agent of the Independent Breweries Co. called at my office one day with reference to this matter (Referring to the option) . . . . I showed him the option, the original option." Schott, himself testified regarding the conversation he had with appellee on the 11th day of February, the day the purported lease was

of business when the witness Abbott represented the Independent Breweries Co. came to see [illegible] the leasing of said premises and that Abbott said to [illegible] "You sign this (referring to said lease) and if the Brewing Co. doesn't take, it we will." Mr. Abbott said him to sign it, sign the blank. I knew the Brewing Co. He said if the Corn Brewing Co. doesn't want to take it, we will." Curtis Hoomer testified. "I was at Chicago and State, at Mr. Conwayse's; I knew of Mr. Abbott; I saw Mr. Abbott and Mr. Conwayse in the basement; . . . I was there and they were talking about the lease business with the Brewery and Mr. Conwayse says, well, what about it? Well, he says, we will just have to wait until the options of the Brewery and if they don't take it we will." The evidence further discloses that [illegible] through the mysterious fact that the option held by the Lamp Brewing Co. and the Corn Brewing Co. this knowledge on February 11, 1924, at the time the [illegible] letter (exhibit 1) and [illegible] was signed.

D. A. Grindeldie, a witness called on behalf of the police testified that Abbott called me up, he is the representative of the brewery. . . . I told him we have an option on it (referring to the building). I. C. Watt, a witness for appellee testified "Mr. Abbott, the agent of the Independent Breweries Co. called at my office one day with reference to this matter (referring to the option) . . . I showed him the option, the original option." [illegible] testified regarding the conversation [illegible] the 17th day of February, the day the [illegible]

was signed, "I am the one that brought up the option about the Lemp Brewing Company with him; (referring to appellee) I would not have known about it if I hadn't seen Mr. Brindable and he told me that he and Mr. Losecant had an option; and I went over with him to Mr. Smith's office and asked him if that was the case; and he told me yes; and gave the wording of the option."

This evidence, we think, is conclusive to the effect that appellant did know of the option held by the Lemp Brewing Co., to rent said premises, and it is not in a position at this time to urge that it was mislead in regard thereto. It knew of the option and knew that this option did not terminate until March 1, 1914, and before that time, to-wit: on the 14th day of February, the lease was entered into by appellee with said Lemp Company. The evidence further discloses that while it is conceded by bothparties that the purported lease between appellee and appellant was signed on the 11th day of February, 1914, appellant did not cause said lease to be executed and a copy returned to appellee until the 18th day of February, 1914. Appellant's witness, Griesedieck, testified that the lease was executed by its officers not later than February 12, and that a copy of the same was mailed to appellee that evening or the next day, and that appellee did not return the lease to them with notice he would not accept the same until about the 19th or 20th of the month. An envelope, however, was offered in evidence addressed to appellee which he testified he received with said lease, and which was stamped as re-

was signed, "I am the one that [illegible] on the option [illegible] the loan drawing Company with him; (referring to [illegible]) I would not have known about it if I hadn't gone [illegible] and he told me that he had [illegible] and I went over with him to Mr. Smith's office and [illegible] if that was the case; and he told me yes; and [illegible] ing of the option."

This evidence, we think, is conclusive to the effect that appellant did know of the option held by the [illegible] drawing Co., to cast said mortgage, and it is not [illegible] tion at this time to urge that it was misled in regard thereto. It knew of the option and knew that the [illegible] did not terminate until March 1, 1914, and [illegible] [illegible] into by appellee with said Loan Company. The evidence further discloses that while it is conceded by [illegible] the [illegible] signed on the 11th day of February, 1914, [illegible] did not cause said loans to be executed and a copy returned to appellee until the 18th day of February, 1914. [illegible] witness, Brierendick, testified that the loans were executed by the mortgagors not later than February 11, and that a copy of the same was mailed to appellee [illegible] the next day, and that appellee did not [illegible] to them with notice he would not [illegible] the 15th or 20th of the month. [illegible] offered in evidence addressed to appellee [illegible] received with said loans, and [illegible]

ceived by the post office on February 18, 1914, at 7 P.M. It could not have reached appellee until the 19th of February, more than a week after the date of said lease, and five days after the lease between appellee and the Lemp Brewing Co., had been executed.

These facts and circumstances, we think, go in corroboration of the contention of appellee that the lease signed by him, which he says was in blank, was delivered to the agent of said Company to be signed by said Company and to become effective only in the event that the Lemp Brewing Co., did not elect to take said premises under its said option. No consideration having been paid and a delay of over a week having occurred in the execution of said lease by appellant, it would seem that the Lemp Brewing Co. having exercised its option to rent said premises and the appellee having rented the same to it, would terminate the offer to lease to appellant.

It is strenuously insisted by counsel for appellant that if the decree in this case is affirmed, it will amount to holding that a written contract can be varied by oral testimony. We do not think this point is well taken, as there is no attempt in this case as we view it to vary the terms of a written contract. The contention on the part of appellee is that the purported written contract offe in evidence between appellee and appellant fact and that the conditions on thi effect, if at all, never happened. in his contention, the said lease nev

ceived by the post office on February 16, 1918, at 7 ...
It could not have reached appellee until the 18th of February, more than a week after the [illegible] lease, and five days after the lease had been cancelled by the Long-Bell Co., had been executed.

These facts and circumstances, we think, in conjunction of the contention of appellee that the lease signed by him, which he says was in blank, was delivered to the agent of said Company to be signed by said Company and to become effective only in the event that the Long-Bell Co., did not elect to take said [illegible] option. No consideration having been paid nor any delay of over a week having occurred in the execution of said lease by appellant, it would seem that the [illegible] Co. having exercised its option to [illegible] said property and the appellee having rented the [illegible] to it, would terminate the effect of lease to appellant.

It is strenuously insisted by counsel for appellant that if the decree in this case is reversed, it will result in holding that a written contract can be modified by oral testimony. We do not think this is well taken. There is no [illegible] in this case [illegible] the time of a written contract. The contention of the [illegible] of appellee is that the [illegible] in evidence between appellee and appellant [illegible] fact and that the conditions [illegible] effect, if at all, [illegible] in his contention, the [illegible]

Another rule of law applicable in this case is that one party to a contract cannot be bound unless the other party is bound also. It is insisted by appellant that appellee was bound by the purported lease which he signed on February 11, 1914. Said lease was not then signed by appellant, and the witness, Schott to whom said lease was delivered, and the witness, Griesedieck, who testified that he made arrangements with appellant for the execution of said leases, both testified that they had no authority to bind appellant in the making of a lease, then, if appellant was not bound, appellee was not bound, and until the time when appellant had accepted said lease and executed the same, being some five days after appellee had signed the same, appellee would be free to withdraw his offer to lease said premises and his leasing to another in effect would be a withdrawal thereof.

In the case of Scott v. Fowler, 227 Ill. 104, the court at page 109 says. "The transaction was not a contract so long as anything remained to be done by one of the parties thereto. 'The rule is necessarily universal that both must be bound or neither will be.' (Bishop on Contracts, sec.318) The contract was only to be considered complete when the formal prepared agreement was signed by both parties."

We have carefully examined the record in this case and are of the opinion that the decree rendered by the Court was warranted by the evidence and the law applicable thereto. The decree will therefore be affirmed.

Decree affirmed.

Not to be reported in full.

Another rule of law applicable in this case [illegible] one party to a contract cannot be bound [illegible] is bound also. It is limited by [illegible] bound by the provisions [illegible] 1914. [illegible] witness, about to [illegible] witness, unassailable, the [illegible] with appellant for the execution of said [illegible] tified that they had no authority to [illegible] was not bound, and until the time when appellant had accepted said lease and executed the same, [illegible] days after application had lapsed [illegible] free to withdraw his offer to lease said premises and [illegible]

In the case of Scott v. Dwyer, 207 Ill. 164, the court at page 168 says. "The transaction was [illegible] so long as anything remained to be done by one of the [illegible] thereto. 'The rule is necessarily understood that both must be bound or neither will be.' (Lindley on Partnership, [illegible]) The contract was only to be considered complete when the formal required agreement was signed by both parties."

We have carefully examined the [illegible] in this case and are of the opinion that the decree [illegible] the decree will be affirmed.

Decree affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 25th *day of April A. D. 1916.*

Clerk of the Appellate Court.

PINION

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the Seventeenth *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

199 I.A. 139

T. J. Christmann, Admr. of the Estate of Philip Christmann, Deceased.

Appellee.

vs.

No. 53.

October Term, 1915

Illinois Central Railroad Co.,

Appellant.

ERROR TO
APPEAL FROM

Circuit COURT

St. Clair COUNTY

TRIAL JUDGE

HON. W. E. HADLEY.

Term No. 53. In the Appellate Court Agenda No.54.

of Illinois, Fourth District.

October Term, A. D. 1915.

T.J. Christmann, Administrator of the estate of Philip Christmann, deceased, Appellee, vs. Illinois Central Railroad Company, Appellant.	Appeal from the Circuit Court of St. Clair County

Opinion by Boggs, J.

This is an appeal prosecuted by appellant from a judgment of $5000.00 recovered in the Circuit Court of St. Clair County, by appellee, as administrator of the estate of Philip Christmann, deceased, in an action on the case for damages on account of the death of appellee's intestate, alleged to have been caused by the negligence of appellant.

The declaration consists of three counts. The first count charges that ~~appellant~~ defendant was driving a certain locomotive engine in a southeasterly direction in the city of Belleville toward the crossing on Jackson street in said city without any light on the front end thereof, and in consequence thereof, ~~appellee's~~ plaintiff's intestate while attempting to go over said crossing at said place was struck by said engine, receiving an injury from which he afterwards died.

The second count relies on an ordinance of said

Term No. 82. In the Appellate Court [illegible]
of Illinois, Fourth District.
October Term, A. D. 1916.

[illegible]
of the estate of
[illegible],
[illegible],
Appellee,
vs.
Illinois Central [illegible],
[illegible]

[illegible] Appellant.
[illegible] Court
[illegible]

[illegible]

The declaration consists of three counts. The first count charges that [illegible] the defendant's locomotive engine in a negligent manner in the city of [illegible] within several [illegible] the right of way of the defendant, [illegible] intersects with [illegible] the [illegible] crossing [illegible] causing an injury from which he died [illegible].

The second count relies on an [illegible]

city limiting the speed in said city of passenger trains to ten miles per hour, and other trains to six miles per hour, and charges that ~~appellant~~ defendant at about 10:30 P.M. on the evening in question drove a certain locomotive engine on its said tracks toward said crossing at a greater rate of speed than six miles per hour, to-wit: at twenty miles per hour, in violation of said ordinance, and that by reason thereof said engine struck ~~appellee~~ plaintiff's intestate and caused injuries to him from which he afterward died.

The third count charged general negligence in the operation of said engine, resulting in injury to ~~appellee's~~ plaintiff's intestate as he was attempting to cross said track. Each of said counts alleged due care on the part of ~~appellee's~~ plaintiff's intestate at the time of said injury.

~~To said declaration a plea of not guilty~~ was filed, ~~trial was had resulting in a verdict and judgment for $5000.00~~

Jackson street in the City of Belleville runs north and south, and Tenth street east and west. ~~Appellant's~~ Defendant's railroad runs in a northwesterly and southeasterly direction through said city at and near the point where it crosses Jackson street. At the intersection of Jackson and Tenth streets, on the southerly side of ~~appellant's~~ defendant's right of way is located a combination saloon and residence. The south side of said building is on the north street line of Tenth street and on said street line, runs to within about five feet of the west line of Jackson street. There are two doors to the saloon, one at the southeast corner on Tenth street and the other at the northeast corner.

city limiting the speed in said city of p[illegible] to ten miles per hour, and other [illegible] hour, and charges that [illegible] on the evening in question drove [illegible] said tracks toward said crossing [illegible] than six miles per hour, to-wit: [illegible] violation of said ordinance, and [illegible] [illegible] from which he afterward died.

The third count charges [illegible] operation of said engine, resulting in injury [illegible] intestate as he was attempting to cross [illegible] said counts alleged [illegible] testate at the time of said injury.

[illegible] and [illegible] the following [illegible]

Jackson street in the city of [illegible] north and south, and Tenth street east and west. [illegible] railroad runs in a northwesterly and southeasterly direction through said city and over the point [illegible] Jackson street [illegible] the intersection of [illegible] streets, on the southerly side of [illegible] is located a combination saloon and [illegible] side of said building is on the north line of [illegible] street and on said street line, [illegible] feet of the west line of Jackson street. [illegible] to the saloon, [illegible] and the other at the northwest corner.

Victor Christmann, the brother of ~~appellee's~~ plaintiff's intestate, lived on the southwesterly side of the railroad track about 165 feet northwesterly from the intersection of the south line of the railroad right-of-way with Jackson street. There was a back gate leading from the rear of Victor Christmann's lot to the right-of-way and nearly opposite this gate was a cross-over switch. On the evening of August 29, 1914, ~~appellee's~~ plaintiff's intestate with one Julius Beingheim spent the evening at the residence of his brother, Victor Christmann. A little after ten o'clock it was agreed that ~~appellee's~~ plaintiff's intestate should go to the saloon in question and obtain a bucket of beer for the company. He, with his brother, Victor Christmann, walked to the gate leading from the Christmann residence to the right-of-way of ~~appellant's~~ defendant's railroad. ~~A ellee's~~ Plaintiff's intestate passed through the gate onto the right-of-way and turned in a southeasterly direction down the right of way toward Jackson street. His brother, Victor, returned to his house. The evidence ~~is~~ was not entirely clear as to whether ~~appellee's~~ plaintiff's intestate walked down the center of what is known as the South bound track of ~~appellant's~~ defendant's railroad, or whether he walked between said tracks and the fence. However, it ~~is~~ was conceded that later on, if not immediately, he got upon said south bound track on his way to the saloon.

Victor Christmann testified that after his brother entered the right-of-way of ~~appellant's~~ defendant's railroad, he looked in a northwesterly direction, that at that time no train or

Victor Christensen, the brother of [illegible] Christensen, lived on the [illegible] side of the [illegible] about 100 feet northwesterly from the intersection of the south line of the railroad right-of-way [illegible] road. There was a back gate leading from the [illegible] Christensen's lot to the right-of-way and [illegible] this gate was a cross-over [illegible]. [illegible] August 26, 1921, [illegible] intersection with the [illegible] being aware the coming of the [illegible] Victor Christensen. A little after ten o'clock [illegible] [illegible] intoxicated should go to the [illegible] and obtain a bucket of beer for his companion. [illegible] brother, Victor Christensen, walked to the [illegible] the Christensen residence to the right-of-way [illegible] railroad. [illegible] intoxicated [illegible] down the right of way toward Madison street. [illegible] [illegible], returned to his home. The evidence [illegible] clear as to whether [illegible] intoxicated walked down the center of what is known as the [illegible] and the fence. However, it is [illegible] not immediately, [illegible] way to the saloon.

[illegible]

in a northwesterly direction, [illegible]

engine could be seen. This was the last time that Victor Christmann saw his brother until after the injury. The only person who saw ~~appellee's~~ plaintiff's intestate after he left his brother, Victor, at the gate and passed on to the right of way was Lorane Christmann, a son of Victor Christmann, a boy about thirteen years of age, who testified that he was playing in the yard and that shortly after his uncle had passed through the gate on the right-of-way and started for the saloon, an engine came along from the north-west going in a southeasterly direction; that it stopped at the cross-over switch opposite his father's house and that the switch was thrown and the engine again started in a southeasterly direction. He further testified that he leaped over the fence and started toward his uncle; that he ran all the way as he was fearful on account of his uncle's hearing not being good, that he might be injured by said engine; that a short distance before his uncle reached Jackson street his uncle slowed up for the purpose of lighting his pipe, and that just before he reached him said engine struck him and knocked him down; that when he found him he was lying on the crossing at Jackson street between the rails of the south bound track. He further testified that he immediately notified his father, Victor Christmann, who also in his testimony states that at the time he found his brother he was on the crossing at Jackson street between the rails of the southbound track.

Julius Ringheis testified that he followed Victor Christmann down the right-of-way to where ~~appellee's~~ plaintiff's intes-

[illegible] Tis the last time that [illegible]
Christmas can his troubles would make the injury. The
only person who [illegible] [illegible] after [illegible] left in
brother, victor, at the [illegible] on the right of
way was [illegible] [illegible], a [illegible],
boy about thirteen years [illegible], who [illegible] that he was
playing in the yard and [illegible] across the [illegible]
[illegible] on the right-of-way [illegible] for
the saloon, an engine came along [illegible] [illegible]
[illegible]
was thrown and the engine again [illegible] in a [illegible]
[illegible]
fence and started toward the [illegible]; [illegible] in [illegible] all the way
as he was [illegible] on account [illegible] [illegible]
[illegible], [illegible] [illegible] [illegible]; that
a short distance before [illegible] [illegible] [illegible] across his
uncle [illegible] the [illegible] [illegible] [illegible] line, and
that just before he reached [illegible] said engine struck him and
knocked him down; that [illegible] [illegible] [illegible] on
the crossing at [illegible] [illegible] [illegible] of the
[illegible]
notified the [illegible], [illegible] [illegible], [illegible] in his
testimony [illegible] at the [illegible] [illegible] on the crossing at [illegible] [illegible] [illegible] [illegible] of the
[illegible]

During [illegible] [illegible] [illegible]
[illegible] down the [illegible] [illegible] [illegible]

tate was lying and that they found him on the crossing at Jackson street. Victor Christmann, Lorene Christmann and Julius Lingheim all testified to having observed this engine prior to the time it struck ~~appellee's~~ plaintiff's intestate, and that it ~~was running backward in a southeasterly direction; that the bell was ringing; that no whistle was blown and that a light was on the rear end of the engine.~~ The evidence ~~also~~ disclosed that on account of obstructions shutting off the light from the electric lights, the crossing at Jackson street was dark. Victor Christmann testified that he assisted ~~appellee's~~ plaintiff's intestate to get up, and that he tried to assist him to his residence; that he got him removed from Jackson street along the right of way some twenty- or twenty-five feet when he could take him no farther; that he was finally taken to the hospital where he died from his injuries about four o'clock the following morning.

The controverted facts in this case are as to where appellee's intestate was at the time he was struck by said engine; whether or not the persons in charge of the engine rang a bell or gave other warning of their approach to the crossing at Jackson street, whether or not there was a light on the rear end of the engine, as to the speed of the engine and as to whether appellee's intestate, if on Jackson street when struck, was in the exercise of due care for his own safety.

The principal grounds relied upon by appellant for a reversal of this case are that the verdict of the jury is against the manifest weight of the evidence, and that the

The evidence was sharply conflicting as to where plaintiff's intestate was when struck by the engine, whether at the crossing or 25 to 30 feet away on the railroad right of way. The evidence was also conflicting

[illegible]

as to the speed of the engine as it approached Jackson Street, ~~as to~~ whether a bell was ringing, whether a whistle was blown or other signal given, and whether the engine which was being driven backward had a light on its rear end.]

court erred in refusing certain instructions tendered by appellant.

In support of its contention that the verdict is against the manifest weight of the evidence appellant insists that appellee's intestate was not struck on the Jackson street crossing, but was struck some twenty-five feet northwest of there on appellant's right-of-way; that he was a trespasser at the time of the injury and no charge of a wanton and wilful injury being made in the declaration, that appellee's intestate is not entitled to recover. Appellant further contends that appellee's intestate was not in the exercise of due care when struck by said engine.

The evidence in this case is sharply conflicting on the question as to whether appellee's intestate was when struck by said engine. As above stated Victor Christmann, Lorane Christmann and Julius Linghein all testified that when found immediately after the injury, appellee's intestate was on the crossing at Jackson street.. As corroborative of the testimony of appellee's witnesses there was testimony to the effect that large quantities of blood were found on the crossing at the place where appellee's intestate was alleged to have been found. The only evidence offered to contradict the testimony of these witnesses is the testimony of the witnesses Hettenhausen and Gawald, who testified on behalf of appellant to the effect that on the morning after the injury, Victor Christmann stated to them he found the body of his brother, Phillip, just opposite the cotton wood tree, which cotton wood tree, the evidence

court erred in rendering certain instructions [illegible] appellant.

In support of its contention that the verdict is against the manifest weight of the evidence [illegible] plaintiff's intestate was not struck on the Jackson street crossing, but was struck some twenty-[illegible] northwest of there on appellant's right-of-way; [illegible] a trespasser at the time of the injury and [illegible] wanton and wilful injury being made in the [illegible] appellee's intestate is not entitled to recover. [illegible] further contends that appellee's intestate [illegible] in the exercise of due care when struck by said engine.

The evidence in this case is [illegible] on the question as to where appellee's intestate [illegible] Christmas, Jerome Christmas and Julius [illegible] testified that when found immediately after the injury, [illegible] intestate was on the crossing at Jackson street. [illegible] corroborative of the testimony of appellee's witnesses [illegible] was testimony to the effect that large quantities of blood were found on the crossing at the place [illegible] intestate was alleged to have been found. [illegible] offered to contradict the testimony of these witnesses [illegible] the testimony of the witnesses [illegible] testified on behalf of appellant to the effect [illegible] morning after the injury, Walter Christmas [illegible] he found the body of his brother, [illegible] the cotton wood tree, which cotton wood tree, the [illegible]

shows was about thirty or forty feet in a northwesterly direction from Jackson street on the same side of the right of way as said saloon; and the witnesses Thomas Page and Higden called on behalf of appellant who testified that on the morning following the accident that they asked Lorane Christmann where the deceased was hit, and that he pointed out to him a place about twenty or thirty feet west of Jackson street, about opposite said cotton wood tree. This testimony is denied by Lorane Christmann and he testified that he pointed out to those parties the place on the crossing where the injury occurred. The evidence discloses that the last named witnesses were in the employ of appellant and were probably more or less interested. The witness Julius Dingheim was in no way sought to be impeached. Certain other witnesses testified that when they first saw appellee's intestate after the injury he was some twenty or twenty-five feet west from the Jackson street crossing on appellant's right of way, being at the point where Victor Christmann testified he had taken his brother in an attempt to remove him to his home.

The evidence, as above stated on this controverted question was sharply conflicting, but we are unable to say that the jury were not warranted in finding that appellee's intestate was on the Jackson street crossing at the time of the injury. The testimony of appellee's witnesses on that point was amply sufficient, if believed by the jury, to warrant them in so finding. An attempt is made by appellant

shows was about thirty or forty feet in a northwesterly direction from Jackson street on the west side of the right of way of said railroad; and the witnesses Jackson and Hayden called on behalf of appellant were interrogated that on the morning following the accident that they visited Lorenzo Dirstekmann where the deceased was lying, and that he pointed out to him a place about thirty or thirty feet west of Jackson street, a out opposite said station house. This testimony is denied by Lorenzo Dirstekmann and he testified [illegible] the crossing where the injury occurred. The evidence disclose that the last named witnesses were in the employ of appellant and were probably more or less interested. The witness Julius Tiegheim was in no way sought to be impeached. Certain other witnesses testified that when they first saw appellee's intestate after the injury he was [illegible] crossing on the plaintiff's right of way, being at the point where Victor Dirstekmann testified he had taken his brother in an attempt to remove him to his home.

The evidence, as above stated on this [illegible] question was sharply conflicting, but we [illegible] that the jury were not warranted in finding that [illegible] intestate was on the Jackson street crossing at the time of the injury. The testimony of appellee's witnesses on that point was amply sufficient, if believed by the jury, to warrant them in so finding. An examination [illegible] appellant

to demonstrate that even though appellee's intestate was found at the point designated by appellee's witnesses that it was still one or two feet west of Jackson street. Without going into the testimony in detail on this point we are of the opinion that the jury were warranted in finding that the injury occurred on Jackson street.

It is next insisted by appellant that no negligence was proved against it. As stated the testimony of appelle's witnesses was to the effect that the engine was being driven at a speed of some ten or twelve miles per hour as it approached Jackson street; that no bell was ringing; that no whistle was blown or other signal given; that there was no light on the rear end of the engine and that it was being driven backward on its way to the round house. The testimony of appellant's witnesses was to the effect that the engine was being driven some five or six miles per hour; that there was a lantern on the rear end of the engine and that the bell was rung as they approached the crossing. The engineer and fireman in charge of the engine both testified that as they approached Jackson street they were looking in the direction the train was moving, and that neither of them saw appellee's intestate, and neither of them knew of the injury until the next day. As it is conceded by both sides that appellee's intestate was either on the right of way or the crossing at the time he was struck, and that said engine is the one that struck him, it is not to be wondered at that the jury did not give much credence to the testimony of these witnesses to the effect that the bell was ringing, that they

to demonstrate that even though [illegible] [illegible]
found at the point designated by [illegible]
it was still one or two feet [illegible]
out going into the testimony in detail [illegible]
of the opinion that the jury was [illegible]
the injury occurred on defendant's [illegible]

It is most insisted by appellant that [illegible]
was proved against it. As stated the testimony [illegible]
witnesses was to the effect that the engine [illegible]
at a speed of some ten or twelve miles per hour on its un-
guarded Jackson street; that no bell was [illegible]; that no
whistle was blown or other signal given; that there was no
light on the rear end of the engine and that it was being
driven backward on its way to the round house. [illegible]
many of appellant's witnesses was to the effect that the
engine was being driven some five or six miles [illegible]; that
there was a lantern on the rear end of the engine and that
the bell was rung as they approached the crossing. [illegible]
gineer and fireman in charge of the engine testified
that as they approached Jackson street they were looking in
the direction the train was moving, and that neither of them
saw appellee's intestate, and neither of them knew the
injury until the next day. [illegible] it is conceded by both [illegible]
that appellee's intestate was either on the [illegible] way of
the crossing at the time he was struck, and [illegible]
is the one that struck him, it is not [illegible] that
the jury did not give much credence to the testimony of these
witnesses to the effect that the bell was ringing, that they

were going only from five to six miles per hour, and that a light was on the rear end of the engine.

In view of all the evidence we are of the opinion the jury were warranted in finding that appellant was guilty of negligence in the operation of its said engine.

It is next contended that appellee's intestate was not in the exercise of due care for his own safety at the time of the injury. The evidence discloses that the gate where appellee's intestate passed from his brother's house onto the right of way was some 165 feet northwest of the Jackson street crossing and that at the time he entered said right of way he looked down the track in a northwesterly direction, and that at that time there was no engine or train to be seen, and while the evidence is to the effect that as he walked down the right of way and approached Jackson street, he did not look around, at the same time we are unable to say that his failure to again look for a coming train was negligence per se. It must be remembered he had the right to rely on appellant's duty to ring its bell as it approached the crossing, on its duty not to operate its train through said city at a speed in excess of said ordinance, and on its duty to carry a light on its engine that would serve as a warning to those who might be on the crossing. We think it is a reasonable conclusion to draw from the evidence that if appellant had rang its bell, appellee's intestate, though somewhat deaf, would have heard the same, and would have gotten off the track or that if a light had been on said engine it would have given notice to him of

were going only from five to six miles an hour, and that a light was on the rear end of the engine.

In view of all the evidence we have in the question the jury were warranted in finding that the plaintiff was guilty of negligence in the operation of his motor car.

It is next contended that appellee's instructions were not in the exercise of due care for his own safety at the time of the injury. The evidence discloses that the accident where appellee's intestate passed from his buggy to a place onto the right of way was some 150 feet northwest of the Jackson street crossing and that at the time he entered said right of way he looked down the track in a northwesterly direction, and that at that time there was no engine or train to be seen, and while the evidence is to the effect that as he walked down the right of way and approached Jackson street, he did not look around, at the same time we are unable to say that his failure to again look was a causing, proximate negligence *ex se*. It must be remembered that the right to rely on appellant's duty to ring the bell or blow approached the crossing, on its duty not to operate its train through said city at a speed in excess of said ordinance, and on its duty to carry a light on the engine that would serve as a warning to those who might be on the crossing. We think it is a reasonable conclusion, in view of the evidence that if appellant had rung its bell, appellee's intestate, though somewhat deaf, would have heard the sound and would have gotten off the track or that if a light had been on said engine it would have given warning to him of

its approach, and would have given him an opportunity to have gotten off the track, especially if appellant had been operating its train at no greater rate of speed than specified by the ordinance. It was therefore a question of fact under the circumstances for the jury to say whether or not appellee's intestate was guilty of contributory negligence.

The authorities in this State are to the effect that when traveling upon the streets of cities, one may assume in approaching a railroad crossing that the railroad company will performthe duty imposed upon it by law. Henry v.C.C.C.& St. L. Co. 236 Ill.219; C.B.& Q.R.R.Co.v. Gunderson, 174 Ill.495. And persons crossing tracks may assume that speed ordinances will be obeyed, and that trains will not cross a highway without signals as required by law. C.M.& S.R.R.Co. v. Gunderson, supra. B.& O.S.W.Ry. v. Then, Admr. 159 Ill.535; N.J.& S.Ry.Co.v. Hoadley, admr.220 Ill.462

In the case of Linn v. C.C.C.& St.L.Ry.Co.239 Ill. 132 the court at page 139 says: "This court has repeatedly held that a traveler approaching a railroad crossing is required to use such care as a person of ordinary prudence would exercise under the same circumstances, and this ordinarily demands the use of the faculties of sight and hearing to discover whether a train is approaching or not, but it cannot be said, as a matter of law, that the failure to look or listen under all circumstances will bar a recovery. It is usually a question of fact for the jury to determine, in view

[illegible] the opposed, and would [illegible] to have [illegible] the time, [illegible] been operating the train at the [illegible] specified by the ordinance. It [illegible] of fact under the circumstances [illegible] or not appellee's intoxicated [illegible] negligence.

The authorities in this state [illegible] that when traveling upon the [illegible] v. C.C.C. & St. L. Co., 82 Ill. 272; C.[illegible] son, 172 Ill. 425. And because [illegible] that speed ordinance will [illegible] not cross a highway without signals [illegible]

In the case of [illegible] v. [illegible] 185 the court at page 189 says: "This court has [illegible] held that a traveler approaching a railroad [illegible] required to use such care [illegible] would exercise under the same circumstances, and [illegible] rarily demands the use of the [illegible] to discover whether a train is [illegible] cannot be said, as a matter of law, [illegible] or liable under all circumstances [illegible] usually a question of fact for the jury to [illegible]

of all the surrounding circumstances, whether failure to look and listen constitutes negligence or lack of due care."

In the case of Illinois Term. R.R.Co. v. Mitchell, 214 Ill. 151, at page 154 the court says: "Appellee swore that before he went upon the track of appellant he looked down its track for one thousand feet to the west and that no train was in sight, and that timely notice was not given of the approach of the train. Appellee had a right to rely upon the trains of appellant approaching at the rate of speed permitted by the ordinance of the city of Alton and that its trains would give the warning of its approach required to be given by law. . . . . It is true that railroad tracks are of themselves notice of danger, but we think it was a question for the jury to say whether, in view of all the surrounding circumstances the appellee was guilty of contributory negligence."

This case in some of its features is somewhat like the case at bar as the evidence here discloses that appellee's intestate before he went on the right of way which was at a point 165 feet from Jackson street, looked in the direction from which the train afterwards came, and that at that time there was no train in sight. Notwithstanding he was a trespasser at that time, we are inclined to hold that the observation he made at that time was proper to be shown on the question of the exercise of due care at the time he reached Jackson street as to whether he was guilty of contri-

of all the surrounding circumstances, he then will-
ure to look and listen constitutes [illegible] and it
due care.'

In the case of Illinois [illegible],
214 Ill. 140, on page 154 the court [illegible]
t, at before he went upon the track of [illegible]
rom its track for one time and look to the [illegible]
no train was in sight, and that it did [illegible]
of the approach of the train. According [illegible]
upon the train or sufficient approaching [illegible] the time of
speed permitted by the ordinance of the city of Alton and
that the train would give the warning [illegible]
required to be given by law. . . . . It is the duty of railro-
road trains are of themselves notice of danger, but we think
it was a question for the jury to say the law, [illegible]
all the surrounding circumstances [illegible]
of contributory negligence."

This case in some of its features is [illegible] like
the case at bar as the evidence here [illegible]
interstate before he went on the right of way [illegible]
point 105 feet from Jackson street, located in the direction
from which the train actually came, and [illegible]
there was no train in sight. [illegible]
transcript at that time, [illegible]
observation he made at that time [illegible]
the question of the amount of due [illegible]
reached Jackson street he [illegible]

butory negligence in not again looking for trains.

It is next urged that appellee cannot recover for the death of his intestate for the reason that at the time he received his injury he was going in a longitudinal direction along said right of way across said street. We do not think this point is well taken for the reason it is conceded by appliant that the destination of appellee's intestate was the saloon located at the corner of Jackson and Tenth streets, and no one contends that it was the intention of appellee's intestate to continue further along the right of way of said railroad. The authorities in this State are to the effect that a person rightfully on a highway crossing and a railroad track, has the right to use said highway in crossing the same in any manner he may see fit.

In the case of C.T. & W.R.R.Co. v. Sample, 138 Ill. App. 95, at page 98 the court says: "When once within such boundaries, (that is, of the crossing) a person has the right to travel thereon in any direction, lengthwise, crosswise or in any other way and without regard to the place or direction from or in which he may have approached and entered upon such street, or whether or not he was a trespasser immediately prior to going upon the street." This same doctrine is laid down in Maguire v. C.& E.I.R.R.Co., 120 Ill. App. 112. The case of C.T.& W.R.R. Co. v. Sample was affirmed by the Supreme Court in 235 Ill. at page 564.

It is next contended by appellant that the court erred in refusing the instructions tendered by it beginning

butory negligence in not again looking out for [illegible]

It is next urged that [illegible] cause of [illegible] the death of his intestate for [illegible] he received his injury he was going [illegible] tion along said right of way [illegible] think this point is well taken for [illegible] coded by appellant that the destination [illegible] testate was the saloon located at the [illegible] and Ninth streets, and no one contends that [illegible]

[illegible] the right of way of said railroad. The [illegible] states are to the effect that a person [illegible] way crossing and a railroad or ok, [illegible] said highway in crossing the same in any manner he may [illegible].

In the case of [illegible] v. [illegible], [illegible] App. 85, at page 90 the court says: "[illegible] boundaries, (that is, of the crossing) [illegible] right to travel thereon in any direction, [illegible] wise or in any other way and without [illegible] or direction from or in which he may have [illegible] tered upon such street, or whether or not [illegible] [illegible] immediately enter to going upon the [illegible] [illegible] doctrine is laid down in Lawrence v. [illegible] 120 Ind. App. 128. The case of [illegible] was affirmed by the supreme court in [illegible] 5 Ind.

It is next contended by [illegible] erred in returning the instructions [illegible]

with the fourteenth and ending with the twenty-second. No instructions were asked by appellee, nor were any given on his behalf. Thirteen instructions were given on behalf of appellant. These instructions covered every phase of appellant's defense that was proper under the pleadings or proof, and in our opinion fully presented appellant's theory of the case to the jury, and we do not believe there was any error committed by the trial court in refusing the other instructions offered by it. The fourteenth instruction directed the jury to disregard the first count of appellee's declaration, the fifteenth the second count and the sixteenth the third count thereof. The seventeenth instruction informed the jury that appellee had failed to prove the allegation in the second count with reference to the speed of trains in said city. There was no error in refusing this instruction as no question was made as to the validity of the ordinance and there was testimony on which to base it. The eighteenth, nineteenth and twenty-second instructions in our judgment did not state correct principles of law and it was therefore not error to refuse the same. The twentieth and twenty-first instructions were fully covered by other instructions given.

The further contention is made by appellant that the engine in question did not constitute a train and would therefore not be covered by the ordinance in question. We do not believe this point well taken and that to place so strict a construction on said ordinance would not subserve

the ends of justice. In East St. Louis Connecting Ry. Co. v. O'Hara, 150 Ill. 580, an ordinance very similar to this one was passed upon, and the court at page 586 says: "The point made is that this ordinance has no application to locomotive engines when running alone, and forming no part of a train of cars. We are not disposed to adopt that construction of the ordinance. The purpose of the ordinance was to prevent injury to persons and property from the running of trains and cars at too high a rate of speed within the city, and locomotive engines come clearly within the reason and purpose of the ordinance, as much when running alone as when attached to and propelling a train of cars."

This expression of the supreme court would seem to fully answer the contention made by appellant to the effect that this ordinance was not applicable for the reason that it would not apply to an engine.

Finding no reversible error in the record the judgment of the Circuit Court will be affirmed.

Judgment affirmed.

Not to be reported in full.

[illegible]

v. Cliburn, 130 III. 64, [illegible]

this the was reached when, and the [illegible]

"The point here is [illegible]

to locomotive engine [illegible]

part of a train of cars. [illegible]

that consideration of [illegible]

[illegible] proceed safely to [illegible]

from the running of trains and [illegible]

speed within the city, and [illegible]

within the reason and [illegible]

when running alone as [illegible]

train of cars."

[illegible] This expression of the [illegible]

to fully answer the contention [illegible]

effect that this ordinance [illegible]

reason that it would not [illegible]

[illegible] Adhering to [illegible]

judgment of the Circuit Court will be [illegible].

[illegible]

Judgment [illegible].

[illegible] be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 25th *day of April A. D. 1916.*

Clerk of the Appellate Court.

NOINIO

199 A 166

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the ----17th----- *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Charles A. Bonner,

Appellee.

vs.

No. 17.

October Term, 1914.

Milwaukee Mechanics' Insurance Company,

Appellant.

199 I.A. 166

ERROR TO
APPEAL FROM

Circuit COURT

Union COUNTY

TRIAL JUDGE

HON. WM. N. BUTLER.

Term No. 17. In the Appellate Court, Agenda No. 22.

Fourth District.

October Term A. D. 1914.

Charles A. Bonner, Appellee.	)
vs.	) Appeal from Union County Circuit Court.
Milwaukee Mechanics' Insurance Company, Appellant.	)

McBride, J.

The appellee recovered a judgment in the Union County Circuit Court against appellant for six hundred dollars, which appellant seeks to reverse by this appeal.

~~It appears from the record in this case that~~ On May 11, 1908, at noon, ~~appellant~~ defendant issued a policy of insurance to ~~appellee~~ plaintiff, indemnifying ~~appellee~~ plaintiff from loss or damage by fire for a period of five years, "to an amount not exceeding $750.00 on the following described property while located and contained as described herein and not elsewhere, towit, $400.00 upon the one story roof building and its additions, to be occupied as a dwelling house, situated, etc., $100.00 on frame kitchen, $200.00 upon household and kitchen furniture and utensils, piano, etc., all while contained in the above house, $50.00 on frame barn." At the time ~~appellee~~ plaintiff procured this insurance he was not the owner of any piano and none was in the house insured but the term piano was printed and was a general term used in the policy. On about April 26, 1910, ~~appellee~~ plaintiff contracted with Fred . Bateson for a piano for which he was to pay $200.00 and that the title was to remain in Bateson

until the piano was paid for. Nothing was paid upon the piano. At the time of the contract Watson required ~~appellee~~ plaintiff to procure an insurance policy upon this piano for $380.00, which he did, but the policy was made payable to ~~appellee~~ plaintiff. The piano was placed in ~~appellee's~~ plaintiff's house. On November 2?, 1912; about two o'clock in the morning, a fire occurred and the building and property of ~~appellee~~ plaintiff, including the piano above described, were destroyed. Proofs show the loss on the building to have been four hundred dollars, two trunks full of clothing $40.00, four suits of boys' clothes $12.00, one lot of womens dresses, skirts, etc. $25.00, one lot of mens' clothing $30.00. After the fire ~~appellee~~ plaintiff made proofs of loss by such fire, including the items above specified, and forwarded the same to ~~appellant~~ defendant. At about the same time ~~appellee~~ plaintiff made proof of loss of the piano to the American National Insurance Company. ~~Appellee~~ Plaintiff afterwards instituted suit against the American National Insurance Company for the loss of the piano and when it was ascertained that he was not the owner of it, that the title was in Watson, the Company refused to pay and a compromise of the claim was effected.

It further appeared from the evidence that the ~~appellee~~ plaintiff was a cripple, had only one leg, that his family consisted at that time of himself and two small children and that at the time of the fire he took his children and went to the stable and was caring for them and failed to save any of the articles of furniture. The ~~appellant~~ defendant refused to pay ~~appellee~~ plaintiff his claim or any part of it, for the

until the piano was paid for. [illegible]
piano. At the time of the contract [illegible]
to procure an insurance policy upon this [illegible]
[illegible] ion [illegible], but the policy was [illegible]
the piano was placed in [illegible]'s home. [illegible]
1912; about two o'clock in the morning a fire [illegible]
and the building and property of [illegible], including the
[illegible] accounts, [illegible]
loss on the building to have been [illegible]
two trunks full of clothing [illegible], [illegible]
clothes [illegible], one lot of women's [illegible],
[illegible], one lot of men's clothing [illegible], [illegible] the fire
[illegible] the proofs of loss by such fire, specifying the
items above specified, and forwarded the same to [illegible].
It appears that one time [illegible] made payment [illegible]
piano to the American National Insurance Company.
Wilkerson instituted suit against the American National
Insurance Company for the loss of the piano and [illegible]
[illegible] ascertained that he was not the owner of [illegible], but the
title was in Watson, the company refused to pay and [illegible]
premiums of the claim was effected.

It further appears from the evidence that [illegible]
[illegible] was a couple, and only one [illegible]
[illegible] at that time of Wilkerson and [illegible]
was that at the time of the fire he had [illegible]
[illegible] to the [illegible] and [illegible] for [illegible]
[illegible] any of the policies of [illegible].
[illegible] to pay [illegible] the claim on any [illegible].

reason that he procured insurance upon this piano, as claimed, in violation of the terms of his policy, that he made false statements in the making of his proofs of loss, and set the building on fire. ~~which claims will be hereinafter considered.~~

The declaration filed in this case was of the usual form based upon the insurance policy and the defendant filed several pleas consisting of First.-The general issue, Second.- That the fire in question was caused by the willful and wrongful act of plaintiff; Third.- That the plaintiff neglected to use reasonable means to preserve the property from loss by fire.

The sixth plea avers that the proof of loss presented by plaintiff falsely and fraudulently represented the items destroyed as being of a value which was excessive and fraudulent. Seventh; That other fire insurance was procured by plaintiff upon part of the property included in said policy, towit, the piano above mentioned. Eighth: That he neglected to set forth in his proofs of loss that there was other insurance upon a portion of the said property.

The policy contained the following provision: "This entire policy shall be void ····· in case of any fraud or false swearing by the insured relating to this insurance or the subject thereof, whether before or after a loss." "The entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not on property covered in whole or in part by this policy." "This Company shall not

[illegible]

be liable for loss, etc.,..... or by neglect of the insured to use all reasonable means to save and preserve the property at and after fire." There was also another provision in the policy requiring the insured to give notice of loss, make a complete inventory and the cost of each article and to render a statement upon information and belief as to the origin of the fire, and the interest of the insured in the property, and of other insurance. Appellant has presented in his brief and argument five objections why this judgment should be reversed. We prefer to consider these propositions in a different order than that presented. The second error urged is that the policy provided it should be void in case of any fraud or false swearing by the insured touching any of the matters relating to the insurance, whether before or after the loss and also requiring insured to set forth in his proofs of loss all other insurance, whether valid or not. It is insisted, in his proof of loss he made oath that there was no other insurance. It also urges that false statements were made with reference to the loss of clothing. It was proven on trial that the clothing was destroyed by the fire and nothing to disprove it and it was merely a question of fact for the jury. It is insisted, however, that as he procured insurance upon the piano about two years afterwards, and placed it in the building, that it was also insured under the present policy and the affidavit was false in not showing other insurance. This question will be disposed of under the first objection urged, that other insurance was in

effect at the time.

The third objection urged is that appellee set fire to the building and wilfully neglected to save the property from destruction. This, however, was purely a question of fact for the jury and there was no evidence, except such as might be inferred from the circumstances of appellee's not removing the property from the building, that tended to support these claims but when it is considered that appellee was a one legged man and had two small children to care for and was engaged at the time in caring for these children we can see no room for the contention of appellant upon these points. Indeed, appellant in his argument concedes as much, as he says it might be that appellant could not confidently ask for a reversal of the judgment on the ground that the verdict was manifestly against the weight of the evidence as to these two pleas, referring to the pleas setting up that appellee destroyed the property and neglected to care for it. There is nothing in these objections.

The next objection urged is that the court erred in its ruling upon the question of admissibility of evidence. It appears from the record that appellant placed appellee upon the witness stand and then asked him "How long he had owned the piano," and other similar questions. The ownership of the piano was in dispute and the appellant by his question assumed the very matter in dispute, which was objected to and the court sustained the objection, and we see nothing wrong in this ruling. Upon cross-examination appellee was asked the question, "Tell the jury whether or not at the time

[illegible] at the time.

The third objection urged is that [illegible] fire to the building and wilfully [illegible] [illegible] of fact for the jury and there was no evidence [illegible] such as might be inferred from the [illegible] [illegible] not removing the [illegible] [illegible] and that appellee was a one legged man [illegible] condition to care for, and was engaged on the [illegible] for these children to care for, for the [illegible] [illegible] argument concedes as much, so we have to [illegible] [illegible] appellant could not confidently ask for a reversal of the judgment on the ground that the verdict was manifestly against the weight of the evidence [illegible] [illegible] the time [illegible] [illegible] [illegible] [illegible] to care for it. There is nothing in these objections.

The next objection urged is that the [illegible] in its ruling upon the question of admissibility of evidence. It appears from the record that appellant [illegible] upon the witness stand and then asked him [illegible] owned the piano," and [illegible] of the piano was in dispute and the [illegible] [illegible] the jury a fact in issue, [illegible] to [illegible] wrong in this ruling. [illegible] [illegible] the question, "Tell the jury [illegible] at the time

this piano was insured the title was in you or Watson Brothers." To which objection was made and the court permitted the witness to answer. It is perhaps true, as contended by counsel for appellant, that this and other similar questions objected to called for a conclusion of the witness as to where the title rested but the whole examination of the witness developed the fact that he had purchased the piano under an agreement that the title was to remain in the Watson Brothers until the piano was paid for so that the jury had a full opportunity to determine whether or not the title was in him or in the Watson Brothers, independent of any conclusion the witness might give, and even though the question may have been objectionable we do not believe that under the circumstances, when taken in connection with the other testimony, it was of such an erroneous character as to require a reversal.

The main objection urged, and one to which much of appellant's brief and argument is devoted, is that appellee procured insurance upon the piano above referred to in the American National Insurance Company to the amount of $350.00, and contends that under the conditions of the policy theprocuring of this insurance rendered the entire policy void. It will be observed that at the time that appellee procured the insurance policy from appellant that he was not then the owner of any piano and that the piano was purchased by him and insurance taken in the American National Insurance Company nearly two years afterwards. No claim was ever made against appellant for the loss of this

this piano was insured the title was in [illegible]
[illegible] thereon." To which objection was made [illegible]
mitted the witness to answer. It is [illegible]
[illegible] by counsel for appellees, that [illegible]
[illegible] questions objected to called [illegible]
[illegible] to which the title rested [illegible]
[illegible] of the witness developed the [illegible]
purchased the piano under an agreement [illegible]
to remain in the kitchen [illegible] until the [illegible]
for so that the jury had a full opportunity to [illegible]
whether or not the title was in him or in [illegible]
[illegible], independent of any conclusion [illegible]
[illegible], and even though the question may have been [illegible]
able, we do not believe that under the circumstances, [illegible]
[illegible] in connection with the other testimony, [illegible]
such an erroneous character as to require a [illegible]

The main objection urged, and one [illegible]
of considerable brief and argument is [illegible]
[illegible] procured insurance upon the piano [illegible]
to in the American National Insurance Company [illegible]
of $300.00, and contends that under the conditions [illegible]
policy disposessing of this insurance [illegible]
policy void. It will be observed that at [illegible]
police procured the insurance policy [illegible]
he is not then the owner of any piano [illegible]
was purchased by him and insurance [illegible]
National Insurance Company merely to [illegible]
claim was ever made against appellant for the loss [illegible]

piano and appellant has not been in any manner injured by the taking out of such insurance and it is sought now to secure a forfeiture of the entire policy because appellant's policy prohibited other insurance. To adopt the construction contended for by appellant would in effect nullify and destroy the contract which should never be done if it can be avoided. Dwelling House Ins. Co. vs. Butterly, 33 Ann.,626. The language of the clause referred to in the policy is, "On property covered in whole or in part by this policy." It is clear that at the time of the issuing of this policy it did not cover the piano, as appellee did not then own it, and in fact never became the absolute owner but the title remained in the Watson Brothers and was in them at the time of the fire, and we think that it would be unjust to permit such a forfeiture of an entire contract to be made when it did not come within the language or spirit of the forfeiture. The item within which appellant contends the piano was included in the policy was only for two hundred dollars, and this also included the household and kitchen furniture. Suppose that appellee had purchased a one thousand dollar piano and placed it in the house could it be said that even though he might have the right to regard the piano as being covered by the general clause of insurance would he be required to accept this general clause and be prohibited from placing other insurance upon the property that was not in fact included in the first policy? It is insisted that the courts have held that where there is a general clause in a policy that property afterwards purchased would be protected under such general clause. This, however, is merely by legal construction for the purpose of enforcing a reasonable contract. We do not

piano and appellant has not been in any manner [illegible] the taking out of such insurance and it is [illegible] insurance [illegible] Hart's policy prohibited such insurance. [illegible] construction [illegible] nullify and destroy the contract which [illegible] done if it can be avoided. [illegible] Butterfly, 82 Ark., 222. The language of [illegible] to in the policy is, "in no way covered in [illegible] part by this policy." [illegible] issuing of this policy it did not cover the piano, [illegible] did not have one it, and in fact never [illegible] owner but the title remained in the [illegible] was in them at the time of the fire, and we think that it would be unjust to permit such a forfeiture of an insurance contract to be made when it did not come within the language or spirit of the forbidding. The [illegible] mutual contract the piano was insured in the [illegible] only for two hundred dollars, and this [illegible] household and kitchen furniture. [illegible] purchased a one thousand dollar piano and placed it in the house could it be said that even though [illegible] right to regard the piano as being covered by the general clause of insurance would be required to accept the general clause and be prohibited from [illegible] encumbrance the property that was not in fact [illegible] first policy. It is insisted that the [illegible] where there is a general clause in a policy [illegible] afterwards purchased would be [illegible] such general clause. This, however, is [illegible] the purpose of enforcing a reasonable contract. We do not

think that a forfeiture of an entire contract should be permitted, unless more substantial causes are presented. Appellee had paid for his insurance upon the property described in the policy. The piano was not described therein and appellant and appellee both understood that the policy as written and paid for did not cover a piano. Appellant has been in no manner injured and it should not be allowed to defeat its liability on account of a forfeiture unless the language of the forfeiture was of that character that courts were compelled to recognize it as such. It is a well settled principle of law that courts look upon forfeitures with disfavor, and unless clearly within the language and spirit of the contract the forfeiture will not permit fair and just contracts to be defeated. Our view upon this question fully warranted the jury in finding as it did, that the appellee was not guilty of wilful and false swearing in making the proofs of loss as contended for by appellant.

The next objection urged is as to the court's refusal to give appellant's 34, 35, 36, 37 38 and 39th instructions. These instructions pertain in one form or another to the right of appellant to declare a forfeiture on account of the insurance of the piano in another company. We have expressed our views fully upon this question and do not believe that the court erred in the refusal of instructions as contended for.

While it may be true that some errors have been committed in the trial of this case but they are not of a

think that a forfeiture of or [illegible]
permitted, unless more [illegible]
Appellee had said for his insurance upon the [illegible]
described in the policy. The [illegible]
therein and appellant and appellee [illegible]
the policy as written and [illegible]
Appellant has been in no manner injured [illegible]
be allowed to defend its liability on [illegible]
feiture unless the language of the [illegible]
character that courts were compelled to [illegible]
such. It is a well settled principle [illegible]
look upon forfeitures with disfavor, [illegible]
within the language and spirit of the [illegible]
will not permit fair and just contracts to be [illegible]
view upon this question fully warranted us, [illegible]
ing as it did, that the appellee has not [illegible]
and false swearing in making the proofs [illegible]
for by appellant.

The next objection urged is [illegible]
to give appellant's 14, 30, 32, 37 and [illegible]
These instructions permit in one form or another [illegible]
of appellant to declare a forfeiture [illegible]
surrence of the gross in another [illegible]
our view fully upon this question and [illegible]
the court erred in the refusal of [illegible]
[illegible].

[illegible]
committed in the trial of this case, but [illegible]

character that should work a reversal of the judgment of the court below. We believe that substantial justice has been done in this case and that the jury was fully warranted in finding a verdict for the plaintiff, and the court in rendering judgment thereon, and the judgment of the lower court is affirmed.

[illegible]

Not to be reported in full.

character that would work a reversal [illegible]
the court below. We believe that [illegible]
been done in this case and that the jury [illegible]
ranted in finding a verdict for the [illegible]
court in rendering judgment thereon, [illegible]
the lower court is affirmed.

[illegible]

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 24th *day of April A. D. 1916.*

Clerk of the Appellate Court.

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s .....

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the -----17th---- *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Emma Horst,

Appellee.

vs.

No. 29,

October Term, 1915 4.

St. Louis Electric Terminal Railway Company,

Appellant.

ERROR TO
APPEAL FROM

City COURT

of Granite City, COUNTY

TRIAL JUDGE

HON. M. R. SULLIVAN.

Term No. 29. In the Appellate Court of Ag. No.41.
the State of Illinois, Fourth District.
October Term 1914.

Emma Horst, Appellee,	
vs.	Appeal from the City Court, of Granite City, in Madison County, Illinois.
St. Louis Electric Terminal Railway Company, Appellant.	

McBride, J.

This is an appeal by the St. Louis Electrical Terminal Railway Company from a judgment against it for $6000.00 obtained by Emma Horst in the City Court of Granite City, Madison County at the June Term, 1914, for personal injuries sustained by her by falling into an excavation made by appellant on a street in Granite City.

At the time of the injury to ~~appellee~~ plaintiff October 10, 1913, appellant was operating an Electric Railway line and engaged in the carrying of passengers from St. Louis to Granite City. ~~Appellee~~ Plaintiff was a passenger on one of ~~appellant's~~ defendants' cars on the day in question, and was riding from St. Louis to Granite City, where she resided. ~~Appellant has a car shop in Granite City, where she resided.~~ ~~Appellant~~ Defendant has a car shop in Granite City on G Street between 16th and 17th Streets, and when the car upon which ~~appellee~~ plaintiff was a passenger reached the shop it went upon a sidetrack for the purpose of making

[illegible] No. 90. In the Appellate Court of [illegible]

the State of Illinois, [illegible]

October Term 1914.

[illegible]

vs.

[illegible] Appeal from the City Court of Granite City, [illegible] County, Illinois.

[illegible]

[illegible]

This is an appeal by the St. Louis Interurban Terminal Railway Company from a judgment against it for $[illegible] obtained by Anna Horst in the City Court of Granite City, Madison County at the June Term, 1914, for personal injuries sustained by her by falling into an excavation made by [illegible]

At the time of the injury to appellee [illegible] 1913, appellant was operating an electric railway line and engaged in the carrying of passengers from St. Louis to Venice City. Appellee was a passenger on one of appellant's cars on the day in question, and was riding from St. Louis to Granite City, [illegible]

Granite City on S Street between 19th and 17th streets, and which the car upon which appellee was a passenger proceeded the stop it went upon a siding for the [illegible]

some repairs to the air brakes. The car had been delayed and at that time was about an hour late. It arrived at the shop soon after six o'clock P. M. After it had stood upon the repair track for several minutes ~~appellee~~ plaintiff, together with other passengers, left the car and walked North on G.Street.

G Street ~~is~~ was one of the public streets in Granite City, but had no walk upon it between 16th and 17th Streets, and as ~~appellee~~ plaintiff and other passengers walked North on G Street to 17th Street they followed the tracks of ~~appellant's~~ defendant's car line. ~~Appellee~~ Plaintiff testified that it was dark and raining and there were no lights of any kind to guide her, and after she had walked North about twenty steps she fell into the excavation in question. She was helped out of the hole and continued to 17th Street, where she boarded a car for her home. Her suit followed, which resulted in a verdict for her in the sum of $[illegible] and judgment was entered for $[illegible] upon a remittitur under the order of the trial court of $2500.00. This appeal follows.

Appellant contends that when appellee left the car, while it was standing on the repair track, she did so without any instruction or direction from those in charge of the car and hence at her own risk; that the excavation into which she fell was marked and lighted by red lanterns and hence appellant had discharged its duty in that behalf. Appellant also complains of the admission of improper testimony, the giving of erroneous instructions and charges that the verdict of the jury was the result of passion and prejudice and that the damages awarded are excessive.

As this case must be reversed for reasons hereafter given it will be unnecessary to discuss in detail the first

some remarks to the air brakes. [illegible]

and at that time was about an hour later. [illegible]

soon after six o'clock [illegible]. After [illegible] the repair track for several minutes [illegible], [illegible] other passengers, left the car and walked [illegible].

O Street is one of the public streets in [illegible]

[illegible] and other passengers [illegible]

[illegible] testified that it was dark and raining and there were no lights of any kind in [illegible] and after the bus walked North about twenty [illegible] fell into the excavation in question. He was helped out of the hole and continued to 17th Street, where she boarded a car for [illegible] followed, which resulted in a verdict for [illegible] and judgment was entered for [illegible] under of the trial court [illegible].

While it was standing on the south track, it did so without any [illegible] from [illegible] the [illegible] and [illegible] just had discharged its duty in that behalf. [illegible] complaints of the admission of improper testimony, [illegible] of erroneous instructions and charges [illegible] the jury was the result of passion and [illegible] the [illegible].

In this case must be [illegible] it will be unnecessary to discuss [illegible] the first

two propositions. It is sufficient to state that the evidence on these two points was conflicting, but there was sufficient evidence on the part of appellee to require a submission of the case to a jury.

Complaint ~~is~~ was made of the following instruction given in behalf of ~~appellee~~ plaintiff:

"The Court instructs the jury, that if you believe from a preponderance of the evidence that plaintiff became a passenger on a street car of the St.Louis Electric Terminal Railway Company, in St. Louis, Missouri, to be carried to a certain point in Granite City, Illinois, on October 10th, 1913; and if you further believe from the evidence, that the said street car came to a stop at Sixteenth and G streets, in Granite City, which was not the destination of plaintiff; and if you further believe from the evidence, that plaintiff was then directed, by a servant of the said company in charge of the said street car, to leave said street car and walk up the track of the St. Louis Electric Terminal Railway Company, and board another street car, which was waiting at Seventeenth street, to convey her on to her destination, then she was a passenger of the St. Louis Electric Terminal Railway Company during the time that she was walking up the track from the street car on which she had been riding to the one which awaited her."

It is said that this instruction "tells the jury that appellee, while walking on the public street, at

the proponents. It is sufficient to [illegible]
-idence on which the rationale [illegible]
-e sufficient evidence of the [illegible]
a substitution of the word [illegible]

[illegible]

given in [illegible]

"[illegible]

leave from a preponderance of the evidence [illegible]
because a passenger on a street car of the [illegible]
ville Terminal Railway Company, in St. Louis, [illegible]
on October 10th, 1912; and it was further [illegible]
evidence, that the said street car came to a [illegible]
Fifteenth and O streets, in Granite City, which [illegible]
[illegible]
from the evidence, that plaintiff was then [illegible]
a passenger of the said company in charge of [illegible]
[illegible], to leave said street car and walk up the [illegible]
the St. Louis Electric Terminal Railway Company, [illegible]
small [illegible] car, which was waiting at [illegible]
to convey her on to her destination, then [illegible]
[illegible]
[illegible] the time that she was walking up the [illegible]
[illegible] car on which she had been riding [illegible]
[illegible]

It is said that [illegible]
[illegible], while walking [illegible]

liberty to take another car or not as she saw fit, continued to be a passenger on appellant's line. We do not think it subject to the above criticism in view of the evidence. Plaintiff ~~Appellee~~ and two other witnesses testified that while the car was waiting a passenger asked one of the crew if the car was going any further and he said, "This car isn't going any farther. Get off here and walk up to Seventeenth and catch the next car". Then plaintiff ~~appellee~~ and other passengers left the car and started for the place indicated. This testimony was offered in support of plaintiff's theory of the case, and if true appellee was justified in leaving the car and walking to 17th Street for the purpose of taking another car to the end of her destination. The fact that she had severed her relation with this particular car and might have continued on her way home by some other conveyance does not change the situation in view of the fact that she did not do so. She followed the instructions she testified she had received and while doing so the relation of carrier and passenger continued.

The further criticism is made that the instruction assumes there is evidence that appellee was directed to leave the car, walk up the track of appellant to board another car which was waiting at Seventeenth Street. As heretofore stated the evidence upon these points was conflicting but there was sufficient evidence to warrant the giving of this instruction. It is true that the testimony does not show that a car awaited her at Seventeenth Street but it does show that she took the next car on appellant's

line after she reached Seventeenth Street. In this respect the instruction is not strictly accurate, and no injury could possibly have resulted from it.

The court further instructed the jury that "common carriers are required to do all that human care, vigilance and foresight can reasonably do, consistently with the character and mode of conveyance employed and with the practical operation of the road, to prevent injury to passengers".

The objection to this instruction is based primarily upon the contention that appellee was not a passenger at the time of the injury. What we have heretofore said disposes of this objection. It is claimed that even if she was a passenger, the duty of appellant toward her at the time of the injury was only to exercise ordinary care to provide reasonable protection for her.

The instruction here given lays down the correct rule as applied to common carriers of passengers in this State. It has been approved in numerous decisions, a large number of which are cited in O'Callaghan vs. Railroad Park Company 242 Ill.243. The relation of carrier and passenger was not severed at the time appellee left the car. She had not reached her destination, the point to which she had purchased transportation. By reason of the delay of the car and its stop for repairs her continuous passage was broken. The appellant still owed the duty to safely transporting her to her destination. While walking from this car to the one she was to take at 17th Street appellant

owed her as great a duty as if she had been riding on the car. Many text books and decisions lay down the rule that the degree of care required of carriers of passengers of a railroad in respect of their stational arrangements, platforms, halls, stairways and the like is not so great as in respect of their tracks and running machinery; that a less degree of care is required in such cases and that the carrier is bound to exercise only ordinary care in view of the dangers to be apprehended. (3 Thompson on Negligence, 2nd Ed., Sec. 2748; 2 Hutchinson, Carriers, Sec. 941, 3rd Ed.; Shearman & Redfield, 5th Ed. Vol. 2, Sec. 506; I.C.R.R. vs. Keegan, 210 Ill. 150.)

This was the duty resting on appellant toward the public and perhaps other persons lawfully travelling along said street for the purpose of taking passage on its cars or transacting other business, but it falls short of the duty required where a passenger is attempting to complete, under the instruction of the agents or servants of a carrier, a journey that has been interrupted by the fault of the carrier and she is proceeding in the manner pointed out by appellant, or its servants. Under such circumstances the highest degree of care and caution, consistent with the practical operation of the road for the safety and security of the passenger while being transported, is required. Had she been entering the premises for the purpose of boarding the car, or had her journey been completed and she was leaving the premises, the rule invoked by appellant would apply, but under the circumstances of this case we think that ap-

pellant owed her a higher duty, such as is defined in the instruction.

We find no objection to appellee's third instruction. It is the instruction on the measure of damages usually given and uniformly approved by our courts. The evidence warranted its being given in this case.

It is next claimed that the Court erred in permitting Dr. King to testify that he told appellee her condition was probably due to a fall. Dr. King attended appellee for several months after her injury. After describing her condition he was asked what was the cause of such a condition and replied that there were several causes. The following question was propounded to him:

"Q.- Well, could you state some of those?

A.- From the information I derived from her and the description of the condition she was in, I told her probably it was from a fall in her case."

Appellant moved to exclude this answer, but the motion was denied and it is now urged as error as being an opinion on an ultimate fact which was for the jury alone to determine. We think it was error not to exclude this testimony on motion of appellant. The declaration alleged that the injuries of appellee were caused by a fall into the hole heretofore referred to. Under a plea of not guilty the burden was upon appellee to establish the cause of action alleged. At this stage of the case there had been no admission by appellant of an injury to the appellee, especially an injury such as is described by the witness as resulting from the fall she is alleged to have received. The fact of

her having received the injuries from the fall described by her has never been admitted by appellant and appellant introduced witnesses whose testimony tended to controvert that fact and sought to show circumstances tending to lessen the effect of appellee's testimony. In City of Chicago vs. Didier, 227 Ill. 571 it is stated that where there is a conflict in the evidence as to whether the plaintiff was injured in the manner claimed it is not competent for witnesses to give their opinions on that subject. The same rule will apply where plaintiff in making out his case introduces such testimony prior to an admission on the part of defendant of the disputed matter. The fall in this case is neither admitted nor denied by appellant, but appellant sought to show that the injuries of which appellee complained were due to other causes than the fall. This prevents witnesses from giving their opinions as to the cause of her condition. (Illinois Central Railroad Company vs. Smith 208 Ill.608; City of Chicago vs. Didier 227 Ill.571; Schlauder vs. Chicago and Southern Traction Company 253 Ill. 154). We think the admission of this testimony was prejudicial to appellant.

Finally it is contended that the verdict of the jury was the result of passion and prejudice and that the damages awarded are excessive. We have carefully read the testimony in this case and are of the opinion that this objection is well taken. There was some dispute as to the size and depth of the excavation into which ~~appellee~~ plaintiff fell. She testified that the hole was about four feet deep, that she stepped

right into it and was unable to get out alone, that she was helped out and assisted to the corner and there put on a car going to her home. She further testified she was covered with mud, her hands and arms were scratched and she was suffering with a sprained ankle on her left foot and had pains in her right side. When she reached home Dr. King was called and she continued to suffer with pains in her foot and right side, the lower portion of her back and hips. She testified that her foot remained in that condition for about two weeks. On Sunday following her injury, in company with her husband, she went from Granite City to visit her father at Alhambra, Illinois, returning Sunday evening, walking to and from the cars. Her condition as to pregnancy at the time of her injury was uncertain. Her period for menstration had passed about fifteen days and following the fall it commenced with rapidity and continued for several days. For the next two or three weeks she was under a physician's care and an examination five weeks after the fall disclosed a retroflected or retroverted uterus with some prolapse. At the time of the trial Dr. King testified that the uterus was tipped back and at the time for menstration it was necessary to use a dilator to give her relief. He did not testify that she had a miscarriage, but said that it was possible. He also testified that in her present condition she could not become pregnant and that it would require an operation to relieve her. This was the extent of her injury. It is apparent, from a consideration of the whole of the record in this case that the appellant has not had a fair trial

light into it and was unable to pull out again, that she was
helpless and abandoned to the country and [illegible]
carried home to her home. The [illegible] was covered with
mud, her hands and arms were [illegible] and her [illegible]
torn, with a wounded smile on her pale [illegible] face
in her right side. When she reached home Mr. [illegible] was [illegible]
and she continued in bitter [illegible] in her [illegible] right
side, [illegible]
that when her [illegible] in that condition for [illegible]
[illegible]
insured, we must [illegible] strongly to [illegible]
Alnwick, [illegible], [illegible] [illegible], [illegible]
and from the [illegible]. Her condition as to [illegible] at the
time of her injury was uncertain. Her period for convalescence
had passed about fifteen days and following the fall it was
marked with [illegible] and continued for several [illegible]. For
the hour two or three weeks she was [illegible] [illegible]
[illegible] and on examination five weeks after the fall [illegible]
[illegible]
[illegible] and at the time for [illegible] it was necessary
to use a dilator to give her relief. In [illegible] [illegible]
[illegible] and [illegible], but [illegible] it was [illegible].
In fact [illegible] that in her present condition [illegible]
not become [illegible] and that it would [illegible]
to relieve her. [illegible] the extent of her [illegible]
[illegible], with a [illegible] of the [illegible] of the [illegible]
in this case that the [illegible] [illegible] a [illegible]

and that the jury was not entirely free from passion or prejudice. The trial judge, doubtless realized this as he required a remittitur of $2000 but we regard the verdict as reduced excessive. In view of the errors above suggested and the excessive verdict, we believe that justice demands another trial of this case and the judgment of the lower court is reversed and the cause remanded.

Not to be reported in full.

and that the jury was not entirely free from passion or prejudice. As Lord Kenyon, Chief Justice, said: as he required a remittitur of $20.00 but we regard the verdict as reduced excessive. In view of the current decisions, under the excessive verdict, we believe that justice demands another trial of this case and the judgment of the lower court is reversed and the cause remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 24th *day of April A. D. 1916.*

C. C. Johnson

Clerk of the Appellate Court.

PINION

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the ----17th---- *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Ernest Montegard,
Appellee.

vs.

No. 75.

March Term, 1915

Donk Bros. Coal & Coke Company,
Appellant.

199 I.A. 178

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON. LOUIS BERNREUTER.

Term No. 75. In the Appellate Court, Agenda No.38.

Fourth District.

March Term, A. D. 1915.

~~Ernest~~ Ernest Montgard, Appellee. vs. Donk Bros. Coal and Coke Company, Appellant.	Appeal from Madison County.

McBride, J.

Appellee brought this suit against appellant to recover damages on account of personal injuries sustained by him, while employed as a driver in appellant's coal mine. A jury was waived and trial had before the court resulting in a finding in favor of appellee, with judgment thereon for $3,000.00, to reverse which this appeal is prosecuted.

As grounds for reversal, appellant insists that appellee's injuries were occasioned by the negligence of a fellow-servant, and therefore the master is not liable. It is also urged that the master had no notice of the obstructions resulting in the injuries complained of,- and that the damages awarded are excessive.

~~It appears from the evidence that appellee~~ Plaintiff had worked for ~~appellant~~ Defendant four days prior to the time he received the injury. For two days he had worked at day work; the third and fourth day he was driving, receiving the injuries complained of on the morning of the fifth day. ~~Appellee~~ Plaintiff was working in what is designated as the fifth west entry off the main south entry. The fifth west, at the time of

the injury was about 1200 feet in length, and ran east and west. At the east end where it turned off from the main south entry was a "parting" where empty cars for this entry were placed, and where loaded cars from it were delivered by the drivers. Rooms were turned off the fifth west entry, on either side, at regular intervals of seventy feet each, and were numbered in consecutive order, beginning at the east end of the entry. At the west end of this entry were two stub entries in which coal was being mined.

The entry in question was unlighted, and a single mine track was laid therein, from the "parting" at the east to the west end, upon which pit-cars were hauled. Switches were laid from the entry track into the various rooms for the purpose of taking in empties, and hauling out loaded cars, but no sidings or turnouts were provided, so that cars not being moved could be kept off the main entry track. The manner of delivering cars to and from the miners and loaders was to leave the empty stand upon the entry track, until the loaded car was pulled from the room and placed on the entry track in the clear of the switch, after which the empty was run on to the switch, and into the room. Cars thus handled were, from time to time, left unguarded and unattended, and no method was adopted by which any light or other signal was displayed, so that an approaching driver could ascertain that the track was obstructed.

It also appeared ~~from the evidence~~ that the fifth west entry had a down grade most of the way to the "parting", and room 14 seemed to be at the top of ~~what is referred to as~~ a

the injury was about 1200 feet in length, and ran east and west. At the east end where it turned off from the [illegible] south entry was a "parting" where empty cars for [illegible] were placed, and where loaded cars from it were [illegible] by the drivers. Cars were turned off [illegible] entry, on either side, at regular intervals of [illegible] feet, [illegible] numbered in consecutive order, [illegible] [illegible] [illegible] [illegible].

The entry in question was well kept, [illegible] mine track was laid therein, from the "parting" at the east to the west end, upon which pit-cars were hauled. Switches were laid from the entry track into the various rooms for the purpose of taking in empties, and hauling out loaded cars, but no sidings or turnouts were provided, so that [illegible] being moved could be kept off the main entry track. The manner of delivering cars to and from the rooms and [illegible] was to leave the empty stand upon the entry track, until the loaded car was pulled from the room and placed on the entry track in the floor of the switch, when the [illegible] for empty was run in to the switch, and into the room. Cars were handled were, from time to time, both [illegible] [illegible] [illegible], and no method was adopted by which any [illegible] or other signal was displayed, so that [illegible] driver could ascertain that the track was obstructed.

It also appears from the evidence that [illegible] entry [illegible] down, made [illegible] it the way to the [illegible], and [illegible] [illegible] seem to have been at the top of [illegible]

"hill" which extends downward past room 13.

At the time of the injury, plaintiff ~~appellee~~ and another driver by the name of Godfrey were working in the fifth west, Godfrey working that part of the entry from the parting to room 17, and plaintiff ~~appellee~~ working the remainder of the entry to the west, pulling from the face of the entry, and from the two stub entries. It appears from the evidence that plaintiff ~~appellee~~ did no work of any kind in that part of the entry worked by Godfrey, nor did Godfrey go into the portion worked by plaintiff ~~appellee~~, and pull coal from or deliver empties to that part of the mine.

On the morning of the accident plaintiff ~~appellee~~ went into the entry first, with a trip of three empties, followed by Godfrey who went to room 17 and 18. Plaintiff ~~appellee~~ delivered his empties to the west end of the entry, got three loads and started out. At the top of the hill at room 14, he sprangled his cars, and at that point one of his cars was thrown off the track, which delayed him somewhat. He then started down the hill, riding on the front end of his trip, one foot on the bumper of the front car, the other resting on the tail chain. In front of room 13 his mule swerved to the side, and plaintiff ~~appellee~~ saw an empty car on the entry track, immediately ahead of him, and being unable to stop his trip, he leaped into this car. The empty was struck about the same time by plaintiff's ~~appellee's~~ trip of loaded cars, and plaintiff ~~appellee~~ thrown over the front end of the empty, to which he clung until it in turn collided with a loaded car, stand-

hill which extends downward past room 1.

At the time of the injury, [illegible]

or by the name of Godfrey were working in the [illegible]

Godfrey working that part of the entry from [illegible]

room 12, and [illegible] working the remainder of [illegible]

the west, mining from the face of the entry, [illegible]

two stub entries. It appears from the evidence [illegible]

did no work of any kind in that part of the entry

[illegible] Godfrey go into the [illegible]

[illegible] Godfrey, [illegible], and that coal from or [illegible]

that part of the mine.

On the morning of the accident [illegible] left

the entry first, with a trip of loaded [illegible]

by Godfrey who went to room 12 and 13. [illegible]

his employer to the west end of the entry, [illegible]

and started out. At the top of the hill [illegible]

encouraged him some, and at that point one of [illegible]

thrown off the track, which delayed the [illegible]

started down the hill, riding on the front end of [illegible]

one foot on the bumper of the front car, the [illegible]

on the tail chain. In front of room [illegible]

to the side, and [illegible] on [illegible]

track, immediately [illegible] it down, and [illegible]

the trip, he leaped into the car. [illegible]

about the road time by [illegible]

[illegible] thrown over the [illegible]

he clung until it in some [illegible]

ing on the entry track in front of room 10. When ~~appellee~~ plaintiff saw the loaded car he attempted to spring clear of it, but did not succeed, and his limbs were caught between the cars, and back broken between the hips and knees.

The evidence did not disclose by whom the cars with which ~~appellee~~ plaintiff collided were placed upon the entry track. The cars were not guarded, and no light or other warning signal was displayed by which ~~appellee~~ plaintiff could ascertain their presence in time to avoid injury before running into them with his trip.

At the trial ~~appellant~~ defendant offered no evidence, except a plat of its mine which ~~has~~ was not ~~been~~ preserved in the record.

Appellant insists that because appellee and Godfrey were both drivers, both working in the same entry, hauling over the same track, getting empties at the same "parting" to which they delivered loaded pit-cars, they were thus brought into such habitual association that they might exercise an influence upon each other promotive of proper caution, and that these circumstances created between them, the relation of fellow-servants.

Upon this question, the trial court held against appellant, and we would not be justified in disturbing that finding, unless it appears to be against the manifest weight of the evidence, or that the Court mis-applied the law to the undisputed facts in the case.

"Whether two persons, servants of a common master in a given case, are fellow-servants is a mixed question of

law and fact". (Bennett vs. Chicago City Ry.Co.243 Ill., 490; Lake Erie & Western R. R. Co. vs Middleton, 142 Ill., 144.) "The question of the relation of fellow-servants is ordinarily one of fact and only becomes a question of law when there is no dispute with reference to the facts, and the evidence, with all legitimate inferences to be drawn therefrom, is such, that all reasonable and intelligent men must reach the same conclusion." (Bennett vs. Chicago City Ry.Co., supra; Linquist vs. Hodges 248 Ill., 491; Aldrich vs. Illinois Central R.R.Co. 241 Ill.,402.)

It may be conceded that there is no dispute in the evidence in this case as to the circumstances and conditions under which appellee and the driver Godfrey worked, but it does not necessarily follow, that when such evidence, with all legitimate inferences to be drawn therefrom, is considered, that all reasonable and intelligent men would reach the same conclusion as to the relationship which that evidence tended to establish between appellee and Godfrey. The fact that appellee and Godfrey were working in the same entry, hauling loaded and empty pit-cars over the same track, and performing the same general character of work for their common master, did not necessarily make them fellow-servants. Whether it did or not was a question of fact to be determined by the trial court. (Linquist vs. Hodges, Supra; Lake Erie & Western R.R.Co. vs. Middleton, Supra; Mobile & Ohio R. R. Co. vs Massey. Adm. 152 Ill.144).

In determining then whether the trial court properly

law and fact". (Bennett vs. Chicago City Ry.Co.,[illegible] Ill.,
450; Lake Erie & Western R. Co. vs. Middleton, 142 Ind.,
[illegible] "The question [illegible]
ordinarily one of fact and only becomes a question of
[illegible]
and the evidence, with all legitimate inferences to be
drawn therefrom, is [illegible] (and non-[illegible] are a sole conclusion." (Bennett vs.
Chicago City Ry.Co., supra; Lafayette vs. Morgan [illegible]
Ind.; Hibbich vs. Illinois Central R.R.Co. [illegible] Ill.,[illegible])

It may be conceded that there is no dispute in the
evidence in this case as to the circumstances and conditions
under which [illegible] and the driver [illegible] worked, but
it does not necessarily follow, that when such evidence,
with all legitimate inferences to be drawn therefrom, is
considered, that all reasonable and intelligent men would
reach the same conclusion as to the ultimate [illegible] that
evidence tended to establish between [illegible] and [illegible].
The fact that [illegible] and [illegible] were working in the
same entry, [illegible] loaded and empty [illegible] were the
same track, and [illegible] the same general [illegible]
work for their common [illegible], did not necessarily [illegible]
fellow-servants. [illegible] it did [illegible] of
fact to be determined by the trial court. [illegible]

[illegible]

[illegible]

decided this question, the whole evidence, together with all legitimate inferences to be drawn therefrom must be considered. And while the points contended for by appellant may be conceded, there are other circumstances equally important to be considered. For instance it appears from the evidence that the driver Godfrey worked in the east end of this entry; appellee in the west end; that neither hauled empties to, or pulled loaded cars from the territory of the other; that each, in the performance of their respective duties, used separate, distinct, and independent appliances and equipment, subject so far as the other was concerned, to his absolute control and dominion. Our attention has not been called to any evidence adduced at the trial, nor have we been able to find any evidence in this record that tends to show that appellee and Godfrey assisted each other in the performance of their respective duties; nor does it appear that one was under the control of the other, or that their respective duties brought them in contact with each other, or subjected one to the influence of the other, except at such times as both would be using the east portion of the entry track in question.

In view of all of the evidence upon this question, we cannot say that the trial court erred in holding that appellee and Godfrey were not fellow-servants, or that its finding in that regard is against the manifest weight of the evidence.

It is next urged that appellant did not have notice

either actual or constructive of the obstructions on the track which resulted in appellee's injury. Appellant concedes that the placing of the cars on this track, and leaving them unattended and unguarded was negligence. The evidence shows that the method of delivering empties to, and taking loads from the rooms where the driver Godfrey worked was to bring out the load to the entry track, and push it clear of the switch, after which the empty was run to the switch and into the room. While these changes were being made, either the loaded car, or the empty was obstructing the track of this entry. Having failed to provide other facilities for handling cars to and from the working places, appellant must at least have had constructive notice, that by this method, this entry track, between the "parting" and room 12, would from time to time be obstructed, in a manner likely to expose appellee to danger, and in this respect it failed to furnish him a reasonably safe place in which to work.

It is not contended that appellee had notice of these things or that there was any failure on his part to exercise due care and caution for his own safety.

Appellant also contends that the damages awarded are excessive. The evidence shows that both of appellee's legs were fractured between the hips and knees,-the right about six inches above the knee, the left about six inches below the hip, both fractures being oblique. The doctor testified that the result of these fractures was a permanent injury. There are knots on the outside of each leg,-

either actual or constructive of the obstructions in the [illegible] conceded that the placing of the cars on this track, and leaving them unattended and unguarded was negligence. The evidence shows that the method of delivering, matter to, and taking loads from the rooms where the driver [illegible] Frey worked was to bring out the load to the entry track, and push it clear of the switch, after which the empty car was run to the switch and into the room. While these cars were [illegible] structing the track of this entry. Having failed to [illegible] tive notice, that by this method, this entry track, between the "bottling" and room 17, would from time to time be obstructed, in a manner likely to expose appellee to danger, and in this respect it failed to furnish him a reasonably [illegible]

It is not contended that appellee had notice of these things or that there was any failure on his part to exercise due care and caution for his own safety.

Appellant also contends that the damages awarded are excessive. The evidence shows that [illegible] of appellee's [illegible] about six inches above the knee, the leg is bent and inward [illegible] testified that the result of these [illegible] permanent injury. There are [illegible] in the [illegible]

appellee's walk is impaired, and at the time of the trial, over four years after the injury, he still suffered pain from these fractures, and his limbs were somewhat stiff. As a result of the injury his height has been decreased by about one inch. In view of this evidence we cannot say that the damages awarded are excessive.(Illinois Steel Co. vs Mann,160 Ill.,Ap.,367.)

Finding no reversible error in this record, the judgment of the Circuit Court is affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 24th *day of April A. D. 1916.*

Clerk of the Appellate Court.

PINION

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the -----17th----- *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

H. Albrecht & Co., a Corporation
Defendant in Error.

vs.

No. 9.

October Term, 1915

P. Massing and John Beaird Jr.,
Partners doing business under
the Firm Name and Style of
P. Massing & Co.,
Plaintiff in Error.

ERROR TO
~~APPEAL FROM~~

City COURT

of East St. Louis ~~COUNTY~~

TRIAL JUDGE

HON. W. K. VANDEVENTER.

Term No. 9. In the Appellate Court, Agenda No. 2.

Fourth District.

October Term A. D. 1915.

H. Albrecht & Company, a corporation, Defendant in Error.	
vs.	Error to the City Court of East St. Louis.
F. Lassing and John Beaird, Jr., partners, doing business under the firm name and style of F. Lassing & Co., Plaintiffs in Error.	

Leeride, J.

H. Albrecht & Company, defendant in error, obtained a judgment against F. Lassing and John Beaird, Jr., in the city court of East St. Louis for $1046.75, and John Beaird, Jr. prosecutes this writ of error.

It appears from the record in this case that F. Lassing and John Beaird, Jr., had been partners for several years, engaged in the business of running a drum shop and wine room a portion of the time at East St. Louis, Illinois, and that Albrecht & Company had for several years furnished them with their wines and liquors. Albrecht & Company was a corporation, and engaged in the wholesale liquor business in said city. The evidence introduced by John Beaird, Jr., tends to show that previous to December 24, 1912, he sold his interest in the business to F. Lassing and that Lassing assumed and agreed to pay the partnership indebtedness then

outstanding, also that on December 24, 1912, Henry Albrecht, President of the defendant in error, was in the place of business of Massing & Company and that on that date Beaird notified Albrecht that he had sold his interest in the business to Massing and that Massing was to pay the firm indebtedness and that the money was in the safe but Massing had the key and was out in the city some where. That Baird offered to send for Massing to open the safe and Albrecht said that he need not mind, that Massing was all right. That they separated without the money having been paid but the occupants of Massing & Company's dram shop continued to purchase liquors of Albrecht & Company, and the same were charged upon the account of F. Massing & Company, and moneys were paid and credited upon the same account. There was also testimony of other witnesses which tended to corroborate Beaird in his statements. The evidence introduced by H. Albrecht & Company tends to show that the sale was only a pretence and not made in good faith and was for the purpose of enabling Massing & Company to carry on the business of operating a wine room in East St. Louis. Albrecht denies that Beaird ever notified him that he had sold out or that he had any knowledge of such a sale; and denies that he ever accepted Massing for the indebtedness owing to him by F. Massing & Company. Other evidence and circumstances were introduced in evidence tending to corroborate Albrecht.

The cause was tried by a jury and the jury found the issues for Albrecht & Company, and judgment rendered upon the verdict for the full amount of the claim.

The declaration in this case was in assumpsit and consisted of the common counts together with a copy of account

sued upon.

It is contended by counsel for plaintiff in error that John Beaird had been released from the payment of the indebtedness and that Albrecht & Company had accepted F. Massing for the indebtedness of F. Massing & Company. Counsel says, "The principal question involved is whether or not defendant in error agreed to accept Massing as a surviving partner of such business and to look to him alone for the payment of the debt, and to release plaintiff in error as to the obligation of paying the debt or any part of it."

The testimony of Beaird is that on December 24, 1912, he was at the saloon of Massing & Company with Albrecht the President and manager of the company, and that while there he said to Beaird, "Massing ought to make some money here, no doubt about it", and Beaird says that he then told him "That his money was in that safe". That Massing was not there but that I could get him if Albrecht desired. He said, "It isn't necessary, Massing is all right. He was positively notified that I was out of the business". Miller testifies that Beaird stated to Albrecht that he was going to leave and that he had to get out of business and that he would have to look to Massing for it. Shaefler, the bar tender, said Beaird told Albrecht that he had sold out and that they talked about a Government license, also that his money was in the safe and he could get it any time he wanted it and that Beaird offered to send for Massing but Albrecht said never mind. Wright, chauffeur for Beaird, says that Beaird told Albrecht that he had sold his interest in the saloon to Massing and that there was some talk about

money in the safe. This was the substance of the testimony introduced by Beaird for the purpose of showing that he had been released and discharged from the payment of the partnership indebtedness. Beaird stated, on cross-examination, that a man by the name of Losecamp, John Faulkner and Phil Traband were present in the saloon on the day that he told Albrecht that he had sold out. Beaird also further stated, upon cross-examination, that he notified everybody with whom he came in contact that he had sold out. That he notified Nager, the cigar man, and Sam Overmeyer, the chief of police at East St.Louis, that he had sold out. Albrecht denied positively that Beaird ever advised him of having made a sale or that he ever in any manner agreed to take L. Massing for the payment of the partnership indebtedness. Losecamp denies that he was in the saloon when Beaird told Albrecht that he had sold out, and denies that he ever knew that he had sold out. Charles Nager, the cigar man, testifies that Beaird never told him that he had sold out. Samuel Overmeyer, chief of police, testifies that Beaird never told him that he had sold out, or said anything to him about selling out but says that several times during the month of January and February 1913, Beaird came to him and wanted him to give him permission to run his wine room after twelve o'clock and says that he went away about the first of March and that he came to him about one week before he went away, and that he came to see him two or three times a week prior to that time, for this purpose. Robert A. Jost also denies that Beaird ever told him that he had sold out his interest. Albrecht also says that he was in there about the 10th of January and that Beaird directed Massing to give him the money and told him how much to give him and that he received three hundred dollars at that time, and that the money was

taken out of the safe. There are also some circumstances introduced in behalf of Beaird and others in behalf of Albrecht, that tend more or less to corroborate their statements in regard to this matter, all of which were presented to the jury by the respective parties and they had an opportunity to judge of the credit to be given to the respective witnesses and the circumstances presented. The evidence was very conflicting, statements contradictory, some circumstances irreconcilable with all of the testimony and, as we think, under such conditions the jury was the proper one to pass upon those questions and that their finding should not be lightly disturbed.

It is said, however, by counsel for appellant, that the verdict of the jury was manifestly against the weight of the evidence and the Appellate Court should therefore set the verdict aside, and cite several cases in which the verdict had been set aside where a greater number of witnesses testified upon one side than the other, but an examination of those cases discloses the fact that so far as the court could see there were no circumstances or contradictions in the testimony except the bare statement of the witnesses and that the only guide that was left to tell as to the preponderance of the evidence was the mere fact of the numbers that were testifying but in this case it is different. There are quite a number of circumstances surrounding this transaction, including the failure to place Lassing upon the witness stand, who would be able to tell about this sale, if it was in fact made; that the jury had the right to take into consideration in determining who was

telling the truth about this matter, and in most cases referred to, the burden of proving the facts alleged was upon the plaintiff. In this case, however, there is no question about the goods having been purchased or the amount due and owing upon them but the only question is whether or not there had been a sale by Beaird of his interest in the partnership and that Albrecht & Company had notice thereof, and the burden is upon Beaird to show this fact. The jury saw the witnesses upon the stand, observed their conduct and demeanor, their opportunity for knowing who was telling the truth about this matter and were much better able to tell what weight should be given to the testimony of the several witnesses and the circumstances than we can from a reading of the record. We are not able to say that the verdict of the jury was manifestly against the weight of the evidence and by repeated decisions of this and the Supreme Court it has been held that unless we can so say that we should not disturb the verdict, and we are not inclined to disturb the finding of the jury in this matter.

The second point insisted upon by counsel for appellant is that Beaird continued to do business with Albrecht after the first of January, 1913, and that there could be no liability by Beaird for any goods purchased thereafter. This would be true if there had been a sale and Albrecht & Company were notified of such a sale but unless they had been notified of the change of the partnership then Albrecht & Company would have a right to treat it as a continuing partnership, and in fact they did so as they continued to

charge goods purchased to P. Massing & Company. In addition to this it is testified by Albrecht that frequently, after the return of Beaird from his trip, he promised to pay this indebtedness. We think the finding of the jury should be taken by the court as final and conclusive upon this matter.

It is next said that the court erred in admitting the testimony of the witnesses in rebuttal. There was no objection made to this testimony and none preserved in the record, and we do not believe that counsel is in any position to raise this objection, but even if they were, we are inclined to the opinion that the evidence was proper, as these witnesses used in rebuttal were the ones whom Beaird said he had told of having made the sale, and this was for the purpose of contradicting him upon that question, which we believe they had a right to do.

It is next objected that the court refused certain instructions offered by the plaintiff in error. Complaint is made of the refusal of plaintiff in error's first instruction. This instruction was embodied in given instruction No. 2.

Objection is made to instruction No. 5; while it might not have been reversible error to have given this instruction, still we are unable to say that the refusal of it was reversible error for the reason that it assumed that the debt concerning which the contention was being had was that of Beaird, and the evidence shows that it was the debt of P. Massing & Company.

Exception is taken to the refusal of the seventh

instruction also, but we do not believe this criticism is well taken as it was an instruction that informed the jury that the defendant Massing had defaulted and admitted that he was liable for this debt. Why should the court tell the jury what Massing had admitted? The question for the jury was to determine not the admission of the liability of Massing but as to the liability of Menird. We think this instruction was misleading.

After a careful consideration of this record we are not able to say that the court committed any reversible errors in the trial or that the verdict of the jury was manifestly against the weight of the evidence, and the judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 22nd *day of April A. D. 1916.*

Clerk of the Appellate Court.

OPINION

s .....

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the Seventeenth *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Sherman Mason,
Plaintiff in Error.

vs.

No. 10.

October Term, 1915

Illinois Bankers Life Association
of Monmouth, Illinois,
Defendant in Error.

199 I.A. 184

ERROR TO
APPEAL FROM

Circuit COURT

Alexander COUNTY

TRIAL JUDGE

HON. WILLIAM N. BUTLER.

Term No. 10. In the Appellate Court, Agenda No. 60.

Fourth District.

October Term A. D. 1915.

Sherman Mason, Plaintiff in error. vs. Illinois Banker's Life Association of Monmouth, Illinois. Defendant in error.	Error from the Circuit Court of Alexander County.

McBride, J.

The plaintiff in error, hereinafter called plaintiff, instituted suit against the defendant in error, hereinafter called defendant, to recover upon an insurance policy, who was defeated in the trial court and by this proceeding seeks a review.

It appears from the record in this case that on October 19, 1907, Bennett Mason, father of plaintiff, procured an insurance certificate or policy in defendant company for two thousand dollars. The policy provided for the payment of assessments and contained a clause of forfeiture in case of failure to pay any assessment. The agent through whom the insurance was procured was D. J. O'Connell of Cairo, who was the defendant's agent at that place. The insured was of the age of forty-nine years, and under the by-laws was required to give guarantee notes for the amount of $24.50, and to pay what they called an admission fee of $24.50. This admission fee belonged to O'Connell as the agent. The injured had no money wherewith to pay O'Connell the admission fee and gave him his

Term No. 4.

In the Appellate Court,

Joseph Zaretsky,

October Term A. D. 1915.

Joseph Zaretsky,
Plaintiff in error,

vs.

Illinois Temperance Alliance,
Corporation of Delaware,
Illinois,
Defendant in error.

Error from the Circuit Court of Alexander County.

Opinion, J.

[illegible]

[illegible]

note therefor for $24.50. The first assessment was made in January but the insured insisted that O'Connell had told him he would not have to pay the first assessment, and through the instrumentality of O'Connell the first assessment was abated. Between the first assessment made in January and the second one made in April, the insured made several payments to O'Connell in small amounts, ranging from one dollarx to six dollars making a total of twenty-four dollars. The last payment of six dollars having been made on the 11th of April, 1908. At about the time the last payment was made the insured received notice of an assessment for $6.13, designated as Call. No. 42. In a letter later he claimed that the payments made by him to O'Connell were upon his assessments but O'Connell said they were paid to him upon his note given as admission fee and credited thereon. It was not claimed there was any payment made of the April assessment, except the money paid to O'Connell. Assessments were made by defendant upon their policies in July and October and were designated as Call No. 43 and No. 44 but no assessment was extended at these dates against this policy. Between the time of payment made to O'Connell in April and the month of October the insured moved to Missouri, ~~and in October he forwarded a~~ money order to O'Connell for $6.25, which was by him turned over to the Company and O'Connell advised him that he was no longer the agent of the company and to transact his business with the company. This led to a correspondence between the secretary of the company and the insured. Several letters were passed, in some of which the Secretary of the Company called the attention of the insured to the fact that his policy lapsed in April. He in return claimed that he had made the payments to their agent O'Connell. The Secretary

advised the insured that he would investigate this matter and hoped to adjust things satisfactory to all concerned. It appears, however, that as a result of the correspondence that on November 5, 1908, notice was given to the insured and he was called upon to pay assessments No. 42, No. 43 and No. 44 of $5.13 each, and notified that unless paid within one month the policy would be forfeited. The insured died on November 14, 1908, and before the expiration of the one month. The plaintiff is a son of the deceased and beneficiary named in the policy. Shortly after the death of his father he wrote the Company a letter requesting blanks for proof, etc., and was then notified by the Company that the policy was forfeited in January last.

It is claimed by appellee that the policy was forfeited and by appellant, -First, that he had made the payments and, Second.- that even if he did not make the payments to the proper person that the forfeiture was waived.

The declaration filed in this case was in the usual form, declaring upon the policy and claiming that by reason of failure to pay the same he was damaged to the amount of $2500.00. The defendant filed the plea of general issue and a special plea averring that the insurance had lapsed for failure to pay the calls Nos. 42, 43 and 44. To this plea plaintiff replied: First.- That the calls were regularly paid. Second.- That there was a waiver of forfeiture. It was upon these issues that the case was tried by a jury.

The only question that we deem necessary to consider in the determination of this case, as disclosed by this record, is, Does the evidence herein fairly tend to prove a waiver of forfeiture, the effect of such waiver, and the instructions given for appellee upon this subject.

[illegible] the insured that he would [illegible]
[illegible] a right [illegible] interpreting [illegible]
[illegible] insured. This is a [illegible]
[illegible] number 2, [illegible], notice was given [illegible]
[illegible] was called upon to pay assessments [illegible]
[illegible] 44 of 19.15 cent, and notified that [illegible]
[illegible] 1908, and before the expiration of the [illegible]
[illegible] The plaintiff is a son of the deceased and [illegible]
[illegible] to which the company's letter requesting [illegible]
[illegible], etc., and was then notified by the company that the
[illegible] was forfeited in company [illegible].

It is claimed by appellee that the policy was [illegible]
[illegible] and by application, first, that [illegible] the [illegible]
[illegible], second.- that even if he did not make the [illegible]
the proper person [illegible] the forfeitures are waived.

The determination filed in this case was in the [illegible]
[illegible], insisting upon the policy and claiming that by reason
of failure to pay the same he was damaged to the amount of
[illegible]. The testimony [illegible] the plaintiff [illegible]
a [illegible] [illegible] that the insurance had lapsed [illegible]
[illegible] the [illegible] 19.15 and at, to this [illegible]
[illegible] complied: first.- that the [illegible] [illegible]
[illegible]. Second.- that there was a waiver of forfeitures. It
are upon these issues that the case was tried by a jury.

The only question that we take according to [illegible]
[illegible] in the determination of this case, as [illegible] by
[illegible], is, was the evidence [illegible] and to
[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible].

The policy provided that, "Upon the failure of the member to pay the Calls levied within the time allowed by the by-laws of this Association .....such membership shall be forfeited and all rights to any share or interest in the guarantee fund or other property of the Association, shall cease absolutely at the expiration of the time stipulated in which such payments are required to be made." It ~~is~~ was also provided by the by-laws that, "Notice of assessments shall be mailed to each member by the Secretary and thirty days shall be allowed from the date of mailing such notice during which time such assessment shall be paid." This provision was for the benefit of the Insurance Company, and, as we understand the law, could be waived by the Company if it desired so to do. It is said by our Supreme Court that, "It is obvious that the provision in the policy, providing for a forfeiture for a non-payment of the annual premium, was incorporated in the contract for the benefit of the insurance company. The policy did not necessarily become void, if the premium was not paid when due. The company had the undoubted right to waive the forfeiture, if it saw proper, and dispense with a prompt payment of the premium at the time it was due." Chicago Life Ins. Co. vs. Warner, 80 Ill., 410. "An insurance company has the option to waive a condition or stipulation made in its own favor. Forfeitures are not favored in the law, and courts readily seize hold of any circumstances that indicate an intent to waive a forfeiture. ..... Any agreement, declaration or course of action, on the part of an insurance company, which leads a party insured honestly to believe that, by conforming thereto a forfeiture of his policy will not be incurred, followed

The policy provision that, "upon the failure of the member to pay the dues levied within ten days after [illegible] shall be suspended and all rights in any [illegible] vested in the government fund or of any property in the association, shall cease absolutely on the expiration of the time stipulated in which such payments are required to be made." It is also provided by the by-laws that, "[illegible] assessments shall be paid on each member [illegible] and thirty days shall be allowed from the date of [illegible] such dues during which time no assessment shall be paid. While provision exists, the benefit of the insurance [illegible], and, as we understand the law, could be waived by the [illegible] it is desired to do so. It is said by our [illegible] "It is obvious that the revolution in the policy, [illegible] for a forfeiture for a non-payment of the annual [illegible] was a compromise in the interest for the benefit of the insurance company. The policy and not insures only [illegible] in the premium was not paid when due. The [illegible] withdrawal rights in which the [illegible] if it [illegible] and discharge will a [illegible] payment on the premium [illegible] time is not due." Quoting [illegible] "An insurance company has a right to [illegible] tion or suspension [illegible] in its own favor. [illegible] not favored in law, and courts [illegible] any circumstances that indicate it [illegible] intent. ..... Our opinion, [illegible] section, on the part of a insurance company, [illegible] strictly insured constantly [illegible] to a forfeiture of his policy [illegible]

by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract. The company is thereby estopped from enforcing the forfeiture." Conductors' Benefit Asso. vs. Tucker, 187 Ill., 184.

Having seen that it was within the power of the company to waive the forfeiture the next question to be determined is, Does the evidence in this case fairly tend to ~~prove a waiver~~? The letters of the deceased indicated that he was an illiterate man and the evidence tended to show it was difficult for him to understand the plan of insurance. ~~While it does appear that the note given by him to O'Connell was in fact for an admission for the conduct of the deceased would indicate that he thought his payments should be made to O'Connell, the agent; and this is further exemplified by the fact that~~ After he went to Missouri and in October 1908, he sent a money order to O'Connell for $6.25, which would be the insurance due in October. O'Connell indorsed this money order to defendant and forwarded the same and then wrote the deceased to correspond in the future with the defendant company as he was no longer engaged at work with the Company. Then on October 26, 1908, W. A. Sawyer, the secretary of the company, wrote the deceased a letter advising him of the receipt of the $6.25 from O'Connell and also advising him that his insurance lapsed on Call No. 42 and that to place him in good standing he would have to forward $12.14 more, together with a health certificate. On November 2nd, 1908, the deceased wrote the defendant a letter advising it of the receipt of their letter of October 26th., in which he says:

> "I see in your letter you have relapsed policy again, now when did you relaps it and why did you notify me. I can show my receipt

for $24.00 dollars for the last year. I know it not my fault only this lat payment. I never had any instruction your collector called on me and got your money and I thought it was all rite. Now Mr. I think you had out hold me responsible for what your agent does. I have paid into the Illinois Bankers $29.25 and I will write to your collector and see what he has to say about it and I want you to see about it. I never had any instruct to sen it to the home office. Now Mr. have mercy on the widow's son."

On November 5th, Mr. Sawyer, the Secretary of defendant, replied to this letter and advised him that the money paid to the agent was undoubtedly upon the admission fees, and enclosed a health certificate showing the amount necessary to put his policy in force and then adds, "I am writing to our agent for information regarding the amount of money you claim you paid to him and will notify you what he has to say regarding the matter." On November 15th, the deceased wrote to defendant another letter asking the reason why his money was held back and the policy allowed to lapse. And stating that it was no fault of his and that if he wanted the policy to be re-instated he would have to do it, and accuses the agent of having set out to beat him and that he lied to him, etc. There was also offered in evidence a paper marked" Exhibit N. 2", which purports to be a call for assessments Nos. 42, 43 and 44 of $6.13 each, with the credited money order of $6.25, and the balance of $12.14 and advising that this sum must be paid in thirty days, if not the policy will be forfeited. This exhibit had no date and it was not shown when it was received. On November 5, 1908, the defendant company forwarded to the deceased an assessment notice advising him that the amount of $6.13 for call No. 42, $6.13 for call No. 43, and $6.13 for call No. 44, total $18.39, which are required to be paid in one month or policy will be

forfeited. On November the 18th, Mr. Sawyer, Secretary of defendant, wrote deceased another letter in which he advised him that he supposed the money paid by him to O'Conner was upon the admission fee and enclosing a marked folder for him to examine so as to understand the plan of the contract, then he says, "I am again taking this matter up with D. J. O'Connell to see if I can get you straightened out correctly. I am very sorry that there seems to be an apparent misrepresentation of our plan but I certainly hope we can adjust the matter to the satisfaction of all concerned." This was the end of the correspondence and on November 24th, Bennett Mason, the insured, died. It will be observed that assessments Nos. 43 and 44 were not extended against this policy and no notice mailed at the time the assessments were levied upon other policies, but in these two letters written in November it seems that they were then extended and one month from November 5th was given the insured within which to pay these assessments. It certainly looks like an extension of time for making these payments was granted. "Therefore the ten days grace extended by the Company as shown by its notice and receipts, are of no avail to this plaintiff, because payments were not made within such ten days, nor did the loss occur within that time. On the other hand, if there was a waiver for thirty days and the loss occurred within that time, the company would be estopped to avail itself of the defense here insisted upon." United States Life Ins. Co. vs. Ross, 159 Ill., 476.

We are of the opinion that the facts and circumstances surrounding this case are of that character that at least tend to prove there was an extension of time given for the payment of these assessments. This was a question of fact

to be determined by the jury under all of the evidence and proper instructions of the court.

Instruction No. 16, given on behalf of the defendant is erroneous in that it directs a verdict and completely ignores the question of waiver of forfeiture. Instruction No. 18 advises the jury that if the plaintiff failed to pay any one of the assessments that then in that case insured made a default and that if the defendant never voluntary accepted from the plaintiff any sum of money in payment of any assessment or assessments due then there could be no waiver of default and your verdict should be for defendant. This instruction necessarily excludes the idea that the extension of the time of payment might constitute a waiver. Instruction No. 19, is faulty for the same reason and for a further reason that there could be no re-instatement without the furnishing of a certificate of health, when as a matter of fact if the time was extended as claimed by defendant then the certificate of health would not be required. And the same may be said of instruction No. 24. Instruction No. 28, undertook to define a waiver in which it says, a waiver consists of a "voluntary relinquishment of some known right, benefit or advantage which the party would otherwise have enjoyed, it being essentially a matter of intent and which, as in this case, the only proof of that intent rests in what a party does or forbears to do, his act should be so manifestly indicative of an intent to relinquish a then known particular right or benefit that no other reasonable explanation is possible." We think this instruction is also faulty in that it does not give a correct definition of a waiver; it is too narrow and ignores the waiver sought to

to be determined by the jury under all of the evidence and proper instructions of the court.

Instruction No. 11, given on behalf of the defendant is erroneous in that it directs a verdict and completely ignores the question of waiver of forfeiture. Instruction No. 12 advises the jury that if the plaintiff failed to pay any one of the assessments that then in that case insured made a default and that if the defendant [illegible] accepted from the plaintiff any one of the [illegible] assessments of any assessment [illegible] then there could be no waiver of default and your verdict should be for defendant. This instruction completely ignores the fact that the extension of the time of payment might constitute a waiver. Instruction No. 13, is faulty for the same reason and for a further reason that there could be no reinstatement without the furnishing of a certificate of health, when as a matter of fact if the time was extended as claimed by defendant then the certificate of health would not be required. And the same may be said of instruction No. 14. Instruction No. 21, undertakes to define a waiver in which it says, a waiver consists of a "voluntary relinquishment of some known right, benefit or advantage which the party would otherwise have enjoyed, it being essentially a matter of intent and which, as in this case, the conduct of the party [illegible] in which a party does or forbears to do, must be such as to be manifestly indicative of an intent to relinquish a known particular right or benefit that no other reasonable explanation is possible." [illegible] faulty in that it does not [illegible] waiver; it [illegible]

be proven in this case. Where there is evidence fairly tending to prove a waiver then an instruction given for defendant without containing the element of waiver is vicious and calculated to mislead the jury. Grand Lodge A.O.U.W. vs. Lachmann, 199 Ill., 140. It is said by counsel for appellee that the instructions should be considered as a series and that as such lay down the rule correctly. Conceding that the instructions given for plaintiff did lay down a correct rule, many of those given for defendant direct a verdict and were contradictory of the instructions given for plaintiff and necessarily excluded from the jury the consideration of waiver of forfeiture by the extension of time of payment. Even though other correct instructions were given, under such circumstances they would not cure the error complained of. Keith vs. N.St.Louis Suburban Ry. Co. 232 Ill.,126. City of Macon vs. Holcomb, 206 Ill., 243.

We are of the opinion that the element of waiver by the extension of the time for payment was an important one in this case and that the jury were not fairly instructed with reference to plaintiff's rights and that justice demands that a new trial be awarded herein. It is ordered that the judgment of the lower court be reversed and the cause remanded.

REVERSED AND REMANDED.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 24th *day of April A. D. 1916.*

Clerk of the Appellate Court.

NOINI

1 A. 189

(1607)

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the Seventeenth *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Frank Virgin,

Appellant.

vs.

No. 15

October Term, 1915

J. H. Hermanny,

Appellee.

199 I.A. 189

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Perry COUNTY

TRIAL JUDGE

HON. LOUIS E. BERNREUTER.

Term No. 15. In the Appellate Court, Agenda No.5.

Fourth District.

October Term, A. D. 1915.

Frank Virgin, Appellant.	)	
vs.	)	Appeal from the Circuit Court of Perry County, Illinois.
J. L. Hermanny, Appellee.	)	

McBride, J.

The appellant brought this action in the Circuit Court of Perry County for the recovery of certain bonds. The court found the issues for the defendant and dismissed his suit and it is sought by this appeal to reverse the judgment.

It appears from the evidence in this case that Plaintiff ~~appellant~~ and defendant ~~appellee~~ had prior to December 29, 1911, entered into an agreement for the exchange of some lands and in which certain differences were to be paid by plaintiff ~~appellant~~ by the giving of a note, and plaintiff ~~appellant~~ was also to rent the lands that he conveyed to defendant ~~appellee~~ for a term of two years at $1150.00 per year. There was also a stock of goods transferred at this time. Plaintiff ~~Appellant~~ made his conveyance of the lands and, as it appears, was ready to complete his part of the agreement, but, about December 29, 1911, it was ascertained that defendant ~~appellee~~ could not make the conveyance of the

Term No. 15. In the Appellate Court,

Fourth District.

October Term, A. D. 1915.

[illegible], Appellant.	Appeal from the Circuit Court of Perry County, Illinois.
vs.	
[illegible], Appellee.	

[illegible]

The appellant brought this action in the circuit court of Perry County for the recovery of certain funds. The court found the issues for the defendant and dismissed the suit [illegible] by this appeal in reversing the judgment.

It appears from the evidence in this case that appellant and appellee had prior to December 20, 1912, entered into an agreement for the exchange of some lands and in which certain differences were to be made by appellant by the giving of a note, and appellant was already in the lands that he contracted to exchange for a farm of appellee at $115.00 per year. There was also a note [illegible] transferred at this time. Appellant made the exchange of the lands and as it appears[illegible] or the agreement but about December [illegible], 1913, [illegible] tained that appellee could not make the exchange [illegible]

lands he had agreed to convey for the reason that there was a mortgage indebtedness upon the lands for more than he could meet. When this was determined it appeared that another agreement was entered into by which ~~appellee~~ defendant was to surrender the $3700.00 note back to ~~appellant~~ plaintiff and ~~appellant~~ plaintiff claimed that ~~appellee~~ defendant was to return to him ten bonds of the par value of one hundred dollars each, issued by the Troy, Illinois Telephone Company and that ~~appellee~~ defendant was to give the ~~appellant~~ plaintiff the two years rent of the lands free. ~~The appellee~~ Defendant denied that he was to give the rent of the lands free but insisted that ~~appellant~~ plaintiff was to pay him rent therefor, and that the bonds were held by him as collateral security for the rent. At the November Term, 1912, of the Circuit Court of Perry County, Illinois, the ~~appellant~~ plaintiff filed a bill in chancery seeking a specific performance of the agreement upon the part of ~~appellee~~ defendant to return the ten bonds and to surrender the $3700.00 note. It appears from the record that the ~~appellee~~ defendant did not dispute the right of ~~appellant~~ plaintiff to the $3700.00 note, and in fact surrendered the same to him but ~~appellee~~ defendant filed an answer in that case denying that he had agreed to give ~~appellant~~ plaintiff the use of the lands for two years free of rent, and denied that he agreed to return the aforesaid bonds but insisted they were held by him as collateral security for the payment of the rent. ~~It also appears that~~ The cause went to trial and the court found the equities to be with the ~~appellee~~ defendant, and then dismissed ~~appellant's~~ plaintiff's bill.

At the May Term 1914, ~~appellant~~ plaintiff began this suit against ~~appellee~~ defendant alleging in his declaration, in substance, that ~~the~~ ~~appellee~~ defendant had converted the ten bonds aforesaid to

to his own use and claimed damages therefore in the amount of fifteen hundred dollars. To this declaration the defendant filed a plea of general issue and of res adjudicata, setting up the chancery proceedings above mentioned, and what was claimed to be a decree in bar of ~~appellant's~~ plaintiff's rights. A replication was filed to this plea denying that there was any decree of the said supposed former suit as alleged in said plea. The cause went to trial upon this pleading and the court found the issues for the appellee and rendered judgment against appellant for costs.

Counsel for appellant and appellee devote their principal argument to the question as to whether or not there was a decree rendered in the said chancery cause that concluded the parties herein with reference to their rights in these bonds, and it is also insisted by counsel for appellant that the court erred in admitting what he terms a purported decree in evidence, and holding the same as res adjudicata in the case. We think that this is the only question that is necessary to be considered in a proper determination of this suit.

In support of the plea of res adjudicata the appellee offered in evidence a paper purported to be the bill filed by appellant in the chancery case of Virgin vs. Hermanny. This was objected to for the reason that it was not the original bill and for other reasons. The objection was overruled. There was no proof offered to show that it was the original bill or that it was even a part of the files in the case; proof that it was the original bill filed in that case, or that it was a part of the files should have been

made before it was admissible. The appellee then offered a writing purporting to be a decree in that case. This was also objected to. There is nothing connected with this instrument to show that it was a decree of the court. In order for it to become admissible as a copy of the decree it should have been certified to as such under the seal of the clerk of the court. Sec. 13, Chap. 51, Hurds Revised Statute of Illinois. It was not even proven to be a part of the files in the case or in any manner identified.

Appellee sought to avoid the force of this objection by coming into this court and filing what purported to be a supplemental record, which was filed October 27, 1915; also by insisting that the record itself, containing the decree, was offered in evidence. We have examined the record in this case carefully and find the paper purporting to be a supplemental record does not cure the error, it only purports to be a copy of "Defendant's Exhibit B", being the same decree as the one inserted in the bill of exceptions, with the exception that it has attached thereto the certificate of the clerk that it is a true copy of the record and of the decree, but does not purport to be a part of the transcript of the bill of exceptions signed by the Judge. The bill of exceptions contains the purported decree without the certificate of the clerk, and we do not think that the clerk can file a paper that does not purport to supply an omission from the bill of exceptions and thus substitute his view of what was offered in evidence for that of the court. It is said, however that the record of the decree was offered. We find the

[illegible] it was admirable. The specifies [illegible]
[illegible] nothing supporting to be a decree in that case.
was also objected to. There is nothing connected with [illegible]
instrument to show that it was a decree of the court. In
[illegible] for it to become admissible as a [illegible]
it should have been permitted to be read under the seal of
the clerk of the court. Yes. If, then, [illegible] instead
[illegible] of this one. If was not even proven to be a [illegible]
[illegible]

Appellee sought to avoid the force of this objection by calling into court and filing what purported to [illegible] by inserting that the record itself, concerning the order, was entered in evidence. We have examined the record [illegible] carefully and find the paper purporting to be a [illegible] record does not show the court, it only [illegible] [illegible] tion that it has attached the certificate of the [illegible] that it is a true copy of the record and of the [illegible] of exceptions filed by the judge. The bill of exceptions [illegible] the supported decree without the [illegible] clerk, and we do not think that the clerk [illegible] [illegible] of exceptions and their authority [illegible]

following entry in the bill of exceptions: "We offer chancery record, Perry County, No. 17, page 169 in the case of Frank Virgin vs. J. H. Hermanny, amended bill for specific performance", and this is all that is shown with reference to any record. It does not in any manner purport to contain a copy of the record.

We are of the opinion that the court erred in the admission of the evidence above set forth; these were material matters under the issues presented in this case.

It may be said that these are only matters of form and can be cured and that upon another trial the same result will be obtained. That may be true but it will give the court an opportunity to determine whether or not a court of chancery had jurisdiction to try and determine the rights of these parties in a chancery proceeding now set up as res adjudicata in this proceeding. Or was it a matter that must be determined by a court of law.

We are of the opinion that the court erred in the admission of this evidence and for that reason the judgment of the court should be and is reversed and the cause remanded.

REVERSED AND REMANDED

Not to be reported in full.

[illegible] entry in the [illegible] of [illegible]

[illegible]

[illegible] "[illegible]".

[illegible] in reference to any record. It does not in any manner [illegible] part to contain a copy of the record.

[illegible] is the opinion that the court erred in the [illegible] ration of the evidence above set forth; [illegible] [illegible] judicial matters under the issues presented in this case.

It may be said that these are only matters of [illegible] [illegible] are raised and that upon another trial the case pe[illegible] it will be obtained. That may be true but it [illegible] [illegible] not an opportunity to determine whether or not a court of [illegible] [illegible] jurisdiction in the [illegible] [illegible] [illegible] adjudicate in a proceeding. It was in a matter that [illegible] [illegible] is [illegible] in law.

[illegible] is the opinion that the court erred in the [illegible] [illegible] the court should be and is reversed and the cause remanded.

[illegible]

[illegible] in this.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 24th *day of April A. D. 1916.*

Clerk of the Appellate Court.

OPINION

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the Seventeenth *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Richard O'Neal for the use of
D. B. Yezner,
Appellant.

vs.

No. 25.
October Term, 1915

Saline County Coal Company,
a Corporation,
Appellee.

~~ERROR TO~~
APPEAL FROM

City COURT

of Harrisburg COUNTY

TRIAL JUDGE

HON. W. H. PARISH.

Rec. No. 25. In the Appellate Court Agenda No. 27.
of Illinois, Fourth District.
October Term, A. D. 1915.

Richard O'Neal, for the use of D. B. Yezner, Appellant, vs. Saline County Coal Company, Appellee.	Appeal from the City Court of Harrisburg, Illinois.

McBride, P.

It is disclosed by the recordin this case that Richard O'Neal began work for appellee on February 16, 1914, and continued working for it as a coal miner up to the time of the trial of this case. It is true that he testifies th he worked upon a church for a few days, but the work upon the church was only temporary, and the witness says that he never did quit working for the appellee. On August 13, 1914, O'Neal gave to C. V. Parker a power of attorney, which recited - "For the purpose of securing any and all sums of money now or hereafter to become due from me to said City Loan & Insurance Company, I hereby make, constitute and appoint C. V. Parker my true and lawful attorney, and I direct him for me in my name, place and stead at any time hereafter at

his option when I may be indebted to the said Loan & Insurance Company, as collateral security for any such indebtedness, the assignment and transfer to said City Loan & Insurance Company of all my wages, salary and commission then owing, or to be thereafter earned, from any individual, firm or corporation by whom I may then be employed. And my attorney is hereby authorized and empowered to make, execute, acknowledge and deliver, at his option, like successive assignments of my wages, salary and commissions until any and all sums of money due, or hereafter becoming due, from me to the said City Loan & Insurance Company are satisfied in full." On the 13th of August, 1914, the said C. V. Parker assigned to the City Loan & Insurance Company all wages due or to become due O'Neal from the Saline County Coal Company for a period of five years, and directed the payment of such wages to the said City Loan & Insurance Company, and this assignment was filed with the appellee August 19, 1914. It also appears that it has never been withdrawn, or the power of attorney revoked, and that there was due and owing to the City Loan & Insurance Company $39.77 on January 29, 1915.

The record discloses an agreement that on October 28, 1914, Yezner obtained judgment against O'Neal for $65.00 and costs, and that the judgment was unsatisfied, and that an execution was issued and returned "no property found", and that Yezner filed an affidavit and obtained garnishee summons on January 29, 1915, which was served as required by law, the cause heard and judgment was rendered against the appellant. It was also agreed that O'Neal owned, between the

[illegible]

first and fifteenth of January, 1915, $24.85 which was due and payable on January 29, 1915.

In the argument of this case counsel for appellant insists that as there is no evidence in this record showing that O'Neal was indebted to the City Loan & Insurance Company on August 13, 1914, the assignment made by Parker of O'Neal's wages on that date was without authority of law and invalid. It is true, as contended, that Parker was a special agent, and that he was authorized by the power of attorney herein recited to make an assignment of the wages of O'Neal to the Loan & Insurance Company at any time that O'Neal was indebted to it; and it also appears that there is no evidence in this record disclosing that an indebtedness did exist at the time of the assignment.

It appears to us that the power of attorney authorizing Parker to make this assignment was limited to a time in which O'Neal was indebted to the City Loan & Insurance Company, and that it was the duty of appellee to show that when Parker executed the assignment he was within the terms of the power of attorney. He was a special agent, and where conditions exist in the authority of the special agent, and where the authority of a special agent is limited and depends upon the existence of certain facts or conditions, then it devolves upon the agent exercising that power to show that the conditions upon which his right to exercise it were then in existence, or that the act had in some manner been ratified by the principal.

It also appears from the testimony of O'Neal that

since he assigned with Parker that Parker drew all of his wages and gave a part of them to O'Neal. His language is, "Since I signed with Mr. Parker, he (Mr. Parker) drew all my wages and he would give me a part of the wages." If it is true, as stated by the witness O'Neal that from the date of that assignment, he permitted Parker to draw all of his wages and received a portion of the wages from Parker, then it certainly was a ratification of Parker's act of assignment, and a waiving of the conditions in the power of attorney which he certainly had the right to waive. O'Neal was in the employ of appellee at the time of the execution of this power of attorney, and was authorized under the law to execute such power of attorney and authorize such an assignment. Mallin vs. Wenham, 209 Ill. 252. If O'Neal permitted Parker from time to time to make such assignments and to receive a portion of the wages from him, even though there may have been some irregularities in the assignment, it would, as we view the law, be at least an equitable assignment of wages. "Such equitable assignments of choses in action in modern times have received a large protection in courts of law, as well as in courts of equity." Chicago Title & Trust Company vs. Smith, 158 Ill. 417. It has been repeatedly held by the decisions of both the supreme and appellate courts of this state that where an equitable assignment exists, and there is a bona fide indebtedness, that courts of law will protect such assignment even in garnishment proceedings.

It is also claimed that as the City Loan & Insurance Company was owned by Parker, that ~~that~~ he was making an assignment of the wages to himself, that he must show his

acts are free from fraud. There is no evidence in this record showing fraud, but it does appear that O'Neal was indebted to the City Loan & Insurance Company to the amount of $39.77 on January 29, 1915, and unless the acts are shown to be fraudulent or made for the purpose of hindering and delaying creditors, the court would not be authorized to indulge in a presumption of fraud. We are of the opinion that the trial court was warranted in rendering a judgment in favor of the appellee, and find no reversible error in the case, and the judgment of the lower court is affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this ..... 24th ..... *day of April A. D. 1916.*

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Clerk of the Appellate Court.

PINION

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the Seventeenth *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

199 I.A. 194

Thomas Pearson for the use of
D. B. Yezner,
Appellant.

vs.

No. 26,
October Term, 1915

Trustees for O'Gara Coal Company,
a Corporation Bankrupt.
Appellee.

~~ERROR TO~~
APPEAL FROM

City COURT

of Harrisburg. ~~COUNTY~~

TRIAL JUDGE

HON. W. H. PARISH.

Record No. 26. In the Appellate Court Ap. No. 28.

of Illinois, Fourth District.

October Term, A. D. 1915.

Thomas Pearson, for the use of J. W. Yezner, Appellant, vs. T. J. O'Gara, W. C. Kiblack, William Weinand, Trustees in Bankruptcy of the O'Gara Coal Company, a corporation, a bankrupt, Appellees.	Appeal from the City Court of Harrisburg, Ill.

McBride, J.

It appears from the record in this case that on November 13, 1913 Thomas Pearson was engaged at work for the O'Gara Coal Company, and on the date aforesaid made and executed to C. W. Parker a power of attorney authorizing him, when the said Pearson was indebted to the City Loan & Insurance Company, to make an assignment of all of his wages and salary then owing or to be thereafterwards earned from any individual, firm or corporation by whom he should be employed, and at his option to make like successive assignments of Pearson's wages until the sums of money due, or hereafter becoming due are satisfied in full. On the 14th of November 1913, the said Parker, as attorney in fact of Pearson, assigned and transferred to the City Loan & Insurance Company

all of the wages, etc. due or to become due to the said Pearson from the O'Gara Coal Company, its successors or assigns, or from any other firm, person or corporation by whom he should hereafter be employed, etc., for a period of five years. This assignment was made on November 14, 1913 and purports to have been filed with appellees as trustees on November 14, 1913. It appears from an agreement contained in the record that the O'Gara Coal Company went into bankruptcy on December 13,1913. On December 14, 1914 D. B. Yezner obtained a judgment against the said Pearson for $31.90 and costs; execution was issued upon such judgment and returned "Not satisfied - No property found." Demand in writing for the wages of Pearson was made and served on him and the appellees on February 13, 1915; on February 13, 1915; on February 14, 1915 an affidavit for garnishee was filed, and on February 16, 1915 a garnishee summons was issued based upon said judgment, and served upon appellee February 16,1915.

It appears from the record in this case that at the time Pearson executed the power of attorney, and that Parker made the assignment, that Pearson was engaged at work for the O'Gara Coal Company, and that on December 13, 1913 said company went into bankruptcy, and appellees were appointed trustees of such bankrupt, and that the wages claimed to have been assigned to the City Loan & Insurance Company and sought to be garnisheed by appellant were due and owing Pearson from the appellees, trustees, etc.

This presents the question as to whether or not the power of attorney executed by Parker, and the assignment made

by him of Pearson's wages, was valid and binding as against the judgment creditors of Pearson. It will be observed that at the time of the execution of the power of attorney and assignment, that Pearson was employed by the O'Gara Coal Company, and at the time of the serving of the garnishee summons he was employed by the appellees, trustees, etc. It has been repeatedly held by the Supreme and Appellate Courts of this state that a workman cannot assign wages to be earned in a future employment for which he had not contracted, and that such assignment cannot be made by an attorney in fact where the power of attorney is entered into before the contract of employment is made. We said in the case of Joe Ellis for the use of W. S. Morris vs. Saline County Coal Company, and decided at the present term of this court, that; "It seems to be the well settled law of this state by numerous decisions that a workman cannot himself assign wages to be earned in a future employment for which he has not contracted at the time of the assignment; and it seems to be equally well settled that he can not assign his wages by an attorney in fact authorized by a power of attorney entered into before the contract of employment is made. Ogle Cooperative Company vs. J. I. Shauman, 181 Ill. App.4; Strombery, Allen & Company vs. Hill, 170 Ill. App.392; Richards vs. Olson, 185 Ill. App. 395."

It is also insisted by counsel for appellant that the power of attorney executed by Pearson to Parker authorized Parker to make an assignment when he, Parker, may have been indebted to the said City Loan & Insurance Company as collateral

Pearson 2

security for such indebtedness, and that there is no evidence in this record showing that at the time Parker assigned the wages to the City Loan & Insurance Company that Pearson was at that time indebted to such City Loan & Insurance Company. We are of the opinion that where a principal authorizes a special agent to perform an act in the name of the principal upon certain conditions, that it then devolves upon the agent to show that those conditions were in existence at the time of the performance of the act or afterward waived. In this case Parker was only authorized to execute this power of attorney at a time when Pearson was indebted to the City Loan & Insurance Company, and no indebtedness having been shown to exist at that time, then the assignment made by him under such conditions would not be valid. For the reasons above indicated we are of the opinion that the trial court erred in rendering judgment in favor of the appellees, and the judgment of the lower court is reversed and cause remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 24th *day of April A. D. 1916.*

Clerk of the Appellate Court.

INION

199 A 195

1611

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the Seventeenth *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

F. P. Crossley,
Appellee.

vs.

No. 27.

October Term, 1915

St. Louis, Iron Mt. & Southern Railway Co.
Appellant.

199 I.A. 195

~~ERROR TO~~
APPEAL FROM

City COURT

East St. Louis ~~COUNTY~~

TRIAL JUDGE

HON. W. M. VANDEVENTER.

Term No. 27. In the Appellate Court, Agenda No.38.

Fourth District.

October Term A. D. 1915.

F. P. Crossley, Appellee.	
vs.	Appeal from the City Court of East St.Louis, Illinois.
St. Louis, Iron Mountain and Southern Railway Company, Appellant.	

McBride, J.

The appellee obtained a judgment for $82.00 in the City Court of East St. Louis, to reverse which the appellant prosecutes this appeal.

~~It appears from the record in this case that appellee was~~ [Plaintiff, being desirous of shipping some cattle, forty-one head, from Pine Bluff, Arkansas to East St. Louis, Illinois, ~~and~~ made application to the agent of ~~appellant~~ defendant at Pine Bluff, Arkansas for a car, and was advised that the cattle would be shipped at about noon of September 11th. The cattle were loaded but not shipped out until 6:20 in the evening, at which time they were shipped to Little Rock, Arkansas, and there the car was transferred and put on the rear of another train of about eighty cars and arrived at Roxie at 3:40 of the ~~next~~ morning of the 12th, where the cattle were unloaded for rest. Plaintiff ~~Appellee~~ was advised by the yard master that his

cattle would be taken out of there about eight o'clock in the morning. Instead of unloading them immediately they were placed upon a side track and allowed to remain in the car until about eight or nine o'clock, when they were then unloaded into the stock pens. The stock pens were muddy and in bad condition and the cattle were kept there for twenty-nine hours. During that day several trains, as claimed by ~~appellee~~ plaintiff, passed going to St. Louis but ~~appellee~~ plaintiff claims he was not able to get his cattle attached to any one of those trains because of the fact that the yard master who they claimed had to arrange to connect them with other trains was out of town, but later on they were shipped out from Hoxie to East St. Louis and arrived at the stock yards about nine o'clock on the morning of the 14th of September, and it ~~is~~ was claimed they were on the road for about sixty-six hours. There was evidence tending to show that during a portion of this time the cattle were roughly handled; that in shipping, the car was placed in a position at the rear of the train so that in starting and stopping the cattle were thrown from their feet and many of them bruised and injured and that they were not well cared for while in the stock yards at Hoxie, and on arriving at East St. Louis were ~~very~~ in very gaunt condition and badly ~~badly punted and~~ bruised, and that the shrinkage was far in excess of that usually sustained by stock, in the making of that shipment. Some of the witnesses placed the shrinkage at one hundred to one hundred and twenty-five pounds, while they should not have shrunk more than from twenty-five to fifty pounds, if properly cared for in the making of the shipment. It appears from the evidence that the usual time for the making of a shipment

from Pine Bluff, Arkansas to East St. Louis, Illinois, allowing rest at Hoxie, as provided by statute, would be about thirty-six to thirty-eight hours. The evidence of ~~appellant~~ defendant tends to show that the trains that the ~~appellee~~ plaintiff claims passed through Hoxie going to St. Louis were not St. Louis trains and that the car of cattle was taken up by the first train that passed and going to St. Louis. The evidence of ~~appellee~~ plaintiff also tends to show that the delay at Pine Bluff caused them to miss connection with the train that should have taken the cattle out from Hoxie on the morning of the 12th, and that such delay was unexplained.

The appellant sought by its testimony to prove that the appellee signed a contract by which appellee agreed that no recovery should be had against appellant unless written notice of the claim was filed with the carrier or its agents within one day after the delivery of the stock at its destination and that the right to bring suit was waived unless suit was commenced within six months, and that the notice was not given and the suit was commenced more than one year after the stock had arrived at its destination. This contract, however, was not proven as the appellee denied that he signed the contract that was offered, and no evidence was introduced by appellant that it was in dispute.

This action was not brought by appellee upon a contract but in tort for failure to perform a duty enjoined upon appellant by law, and the claim is for damages due to the negligence of the appellant in the [illegible] and handling of the stock in question. It seems to [illegible] law

of this state that where goods are shipped that the shipper is not required to bring an action upon a contract, even if one is entered into, but may, if he chooses, bring the action in tort for non performance of duty imposed by law. Phelps, &c vs. I. C. R. R. Co. 94 Ill. 548.

At common law where a common carrier receives goods for shipment it is its duty then to at least use reasonable care and promptness under all of the circumstances in the delivery of such goods and even under the Carmack amendment invoked here by the appellant, it could not by stipulation relieve itself from loss or responsibility due to its negligence. I. M. & T. R.R. Co., vs. Harriman, 227 U. S. 657. Indeed the act of Congress itself provides that a common carrier of interstate freight shall be liable for any loss, damage or injury to such property caused by it, etc. While it is true, as contended by appellant, that where a contract is entered into under the Carmack act of interstate shipment, and by such contract the amount of loss, time for presenting claim and commencement of the suit, etc., may be stipulated against, yet it seems they cannot stipulate against the negligence of the common carrier.

While the shipper might be bound as to such limitations we think that he still has the right to bring his action in tort, and such limitations will become a matter of defense and that it is not necessary that the plaintiff should produce the contract in the making of his case, as contended by counsel for appellant.

The objections urged by appellant for the reversal of this case are principally, the refusal of the court to direct a verdict at the close of the evidence, the failure to give notice within one day after the delivery of the property, and to bring suit within six months, and that as the contract provided for a lower rate of freight that the risk of feeding and caring for the stock in shipment was a burden cast upon the appellee. These objections, however, are all based upon the fact that appellant claims there was a written contract entered into between the appellant and appellee at the time the cattle were received for shipment. The evidence in this case, however, does not warrant the assumption that any such a contract was entered into. The appellant sought to show by the appellee, upon cross-examination, that he signed the contract but this was denied by appellee, and he said that such was not his signature and there was no further proof that we have been able to find in this record that appellee did sign the contract, whereby appellant claims an agreement to give the notice within one day and to bring suit within six months and to assume risks incident to the shipping, as claimed by the appellant. No such contract was proven and the case, as we view it, stands simply upon the rights of appellee as against appellant, without reference to the supposed contract limiting liability.

We agree with counsel for appellant that interstate shipments are controlled by the Federal laws and that the State Courts are bound by the construction placed thereon by the Federal Courts, and that proper limitations and restrictions contracted by a shipper will be enforced, but this case,

as we view it, is without limitations or restrictions and that the appellant is liable for its negligence in the shipping of the stock in question. The question of unreasonable delay and carelessness in the handling of the stock, the injury to the stock and the negligence of the appellant in the handling of the stock were all questions of fact to be determined by the jury and we believe that the jury were warranted under the evidence introduced in this case in finding that the appellant had been negligent, and by such negligence caused the loss to the appellee, and that under the facts as shown by this record the appellee is not limited to six months to bring suit for such negligence.

It is next contended that the court erred in giving appellee's instruction No. 1 because it slides, as it is claimed, an instruct composition of [illegible] misleading in that it left an inference that appellant was not using due care. The instruction is, "The court instructs the jury that when a railroad company receives live stock for shipment it is the duty of such company to use reasonable diligence to carry and deliver said stock to said destination within a reasonable time." We do not believe that this instruction is subject to such criticism.

The next objection is that the court erred in refusing defendant's 2nd instruction, which reads as follows, "The court further instructs the jury that if you find from the evidence that the defendant company sent the cattle in question forward from Roxie, Arkansas on the first stock train leaving there after the expiration of the time required by the Federal Law for feed and rest, then the defendant would

not be liable for any damage to said cattle if not caused by such delay at Hoxie, Arkansas." This instruction ignores the delay in unloading the cattle at Hoxie, the improper care and feeding of them while there, and was misleading in that it assumed the damage was caused by the delay at Hoxie, when in fact there was evidence tending to show damage from other causes than this.

The appellee had a right to bring an action in tort for the injuries sustained to his stock by reason of the negligent acts of the appellant, and if the appellee had in any manner limited his right of action as it existed at law then it was incumbent upon the appellant to show such limitation by proper evidence; and as no contract was proven limiting appellee's rights, and the evidence tended to prove appellant's negligence, we believe that the finding of the jury was warranted by the evidence and that no cause is shown for disturbing the verdict, and the judgment of the lower court is affirmed.

[illegible]

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 24th *day of April A. D. 1916.*

Clerk of the Appellate Court.

NOINIc

1 A 208

1610

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the Seventeenth *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

L. S. Lacey,

Appellee.

vs.

No. 33.

October Term, 1915

A. H. Lacey and E. P. Lacey,

Appellants.

199 I.A. 208

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Marion COUNTY

TRIAL JUDGE

HON. A. N. ROSE.

Term No. 33. In the Appellate Court, Agenda No.70.

Fourth District.

October Term A. D. 1915.

L. S. Lacey, Appellee.	
vs.	Appeal from the Circuit Court
A. E. Lacey and E. F. Lacey, Appellants.	of Marion County.

McBride, J.

~~The parties to this litigation are adjoining landowners in~~ Section Ten of Township four, Marion County, Illinois. ~~Appellee~~ L. S. Lacey owns the southwest quarter of the Northeast quarter of ~~said section.~~ ~~Appellant~~ defendant A. E. Lacey owns the northwest quarter of the southeast quarter; ~~appellant~~ defendant E. F. Lacey owns the northeast quarter of the southwest quarter, and the southeast quarter of the northwest quarter, all in said Section Ten.

~~Appellee~~ Plaintiff filed his original bill in the Circuit Court of Marion County seeking to enjoin ~~appellants~~ defendants from trespassing on his lands, or from entering thereon; or from diverting the water from their premises, onto and across the premises of the complainant; or from cutting ditches thereon, or interfering with complainant's possession thereof; or from reconstructing, repairing or maintaining a dam or embankment, upon the premises of the defendant

J. Lacey, Appellee.	
vs.	Appeal from the Circuit Court
J. J. Lacey and J. H. Lacey, Appellants.	of Marion County.

Appellee, J.

The pre-emption claim of Jonathan Lacey, Marion County, Illinois, embraced J. H. Lacey owns the southwest quarter of the northwest quarter of said section. Appellant Lacey owns the northwest quarter of the southwest quarter, and southwest quarter of the northwest quarter of the southwest quarter, and the southwest quarter of the southwest quarter, all in said section ten.

Appellee alleges its original bill in the Circuit Court of Marion County seeking to enjoin appellants from trespassing on its lands, or from entering upon it; from diverting the water from their premises, and from cutting the timber of the complainant; or from cutting timber, or interfering with complainant's [illegible] Lacey; or from reconstructing, repairing [illegible] a dam or embankment, upon the premises [illegible]

L. F. Lacey for the purpose of diverting water onto and across the premises of complainant.

Complainant charges in his bill that the natural flow of water upon the premises of A. M. Lacey which lie immediately south of his premises ~~is~~ was in a westerly direction, over and across the premises of his son L. F. Lacey, and has been from time immemorial; that there was situated on the premises of said A. M. Lacey, immediately south of the premises of complainant a road, running east and west; that on the south side of said road a ditch had been constructed, and for many years prior to the bringing of the suit carried the water coming from said forty, belonging to A.M. Lacey in a westerly direction, and into a pond located on the premises of said A. M. Lacey; that the overflow from said pond flowed in a westerly direction over and across the premises of L. F. Lacey; avers that defendants cut a ditch near the southwest corner of complainant's land, across the south line of his land so as to cause water flowing from the premises of said A. M. Lacey to be diverted to the lands of complainant; that thereafter, defendants constructed a dam or embankment west of said ditch, and near the southwest corner of complainant's land, near the line between the defendants' land, and extending north of complainant's south line; that said ditch and embankment diverted the water out of its natural course over and across the premises of complainant. The bill further avers that complainant repeatedly filled up the ditches made by defendants; that they repeatedly opened same, and committed divers trespasses upon the lands of complainant in so doing, and tore out portions of his fence; that flood waters washed out said dam and same was rebuilt by defendants. The bill further avers that defendants ~~are~~ were seeking to

[illegible]

Complainant averred in his bill that the [illegible] flow of water upon the premises of A. L. Lacey which [illegible] immediately south of his premises [illegible] in a westerly direction, over adjacent lands of his [illegible] and has been from time immemorial; that thereafter either on the premises of said A. L. Lacey, immediately south of the premises of complainant a road, running east and west that on the south side of said road a ditch had been constructed, and for many years prior to the bringing of the suit carried the water coming from said forty, belonging to A. L. Lacey in a westerly direction, and into a pond located on the premises of said A. L. Lacey; that the overflow from said pond flowed in a westerly direction over and across the premises of A. L. Lacey; avers that defendants cut a ditch near the southwest corner of complainant's land, across the south line of his land so as to cause water [illegible] the lands of complainant; that thereafter, defendants constructed a dam or embankment west of said ditch, and near the southwest corner of complainant's land, and the line between the defendants' land, and extending north of complainant's south line; that said ditch and [illegible] the water out of its natural course over and on the premises of complainant. Complainant [illegible] filled up the ditches made by defendants; that defendants [illegible] and commenced mower [illegible] if complainant in so doing, and [illegible]; that flood waters [illegible] result in damage. Averments [illegible]

acquire an easement in the premises of complainant for the flowage of surface water; charged that complainant has suffered irreparable damage; that he has no adequate remedy at law, and that any attempt to enforce his legal remedies would involve a multiplicity of suits.

Defendants answered this bill denying the material allegations thereof. They averred that the natural flow of surface water falling upon the premises of A.H.Lacey ~~is~~ was north over the lands of complainant; denied that there was any ditch along the north side of the A. H. Lacey land which carried the water from said land into a pond on said premises; averred that there ~~is~~ was a pond located in the northwest corner of the A.H.Lacey land, and in the ~~northwest~~ south corner of the L. S. Lacey land, and the northeast corner of the E. P. Lacey land which from time to time filled with surface water, and when overflowed, flowed in a northerly direction along the west line of L. S. Lacey's land, through a ditch which had been constructed on said lands, prior to their purchase by him; that said ditch was simply a means of collecting water which flowed over said lands in a state of nature; that said ditch was a burden upon the lands of complainant.

The answer further averred that shortly after complainant acquired his land he began constructing a levee along the entire south line thereof, so as to prevent surface water falling upon the premises of A.H.Lacey from flowing northerly as it would do in a state of nature, and that complainant has been increasing this embankment, so that the water ~~is~~ was entirely

diverted from his premises.

Defendants also filed their cross-bill alleging that the natural flow of surface water coming upon the premises of A.M.Lacey, and upon the northeast quarter of the southwest quarter belonging to E.F.Lacey was northerly over the lands of complainant; aver that at the point where these three forties corner there was located a natural swale or depression which collected surface water, and from which, in time of overflow, water flowed northerly through a ditch along the west side of L.S.Lacey's land. The cross-bill further aver that the prior owners of L.S.Lacey's land had constructed a ditch along the west side thereof, whereby water flowing from said pond, and from A.M.Lacey's land, and from the northeast quarter of the southwest quarter belonging to E.F.Lacey were collected and confined and carried northerly over L.S.Lacey's land. The cross-bill further ~~complainants in the cross-bill~~ aver that they, and the prior owners of their respective lands had acquired a perpetual easement in L.S.Lacey's lands to have surface water from their lands drained through the ditch on the west side of L.S.Lacey's land. The cross-bill also charged the maintenance of the levee along the south line of L.S.Lacey's land, by him, and aver that this had dammed up and diverted the water coming from defendants' ~~appellants'~~ premises, and that same has been backed up and held thereon.

The prayer of the cross-bill was ~~is~~, that L.S.Lacey, ~~defendant therein~~ be enjoined from constructing and maintaining embankments along the south line of his lands and in the southwest corner thereof; and from hindering or inter-

fering with the natural flow of the water from off the land of A.R.Lacey, lying south thereof, or the land of E.P.Lacey lying southwest of said lands; that he be required to remove said embankment, and to restore the ditch and the surface of the ground at the southwest corner of his forty acre tract, so that water from the lands of the cross-complainants will flow in the course of nature, over, upon, across and beyond complainant's lands.

The defendant in the cross-bill answered, denying each and every material allegation thereof. The cause was heard in open court, and the issues decided in favor of complainant in the original bill, and a decree entered granting relief, substantially as prayed therein. The cross-bill was dismissed for want of equity. From that decree this appeal is prosecuted.

It is insisted by appellants that this decree should be reversed, and three grounds are assigned upon which that claim is predicated. It is first insisted that appellants are entitled to have the surface water from their lands flow over and across the lands of appellee, as it flowed in a state of nature. If appellee's lands are servient to the lands of appellants, their contention is correct. That right, however, does not appear to be in controversy in this case. As we understand the issues and the evidence the only question requiring consideration is, whether or not such circumstances were disclosed, as conferred upon appellants, or either of them the right to collect, by means of the ditch south of the road on A.R.Lacey's land, all surface

water coming therefrom, carry it to the west side of said land, and there discharge it in a body upon the premises of appellee.

It is next contended that for a period of twenty years prior to the filing of the bill, a system of ditches was constructed contemporaneously, by which water falling upon appellants' lands was interrupted in its flow northerly across the lands of appellee, by the ditch along the south side of what is referred to as the "Courson road", and made to flow west and across the road into a depression or mud-hole at the southwest corner of appellee's land, which in turn connected with the ditch constructed for drainage purposes by the prior owner, a Mrs. Merritt; that by the uninterrupted use of said ditches jointly for the flow of water for more than twenty years, and these ditches being open and visible to appellee when he acquired his land, that appellants' have the right to the uninterrupted flow of water through the ditch on the west side of appellee's land, by prescription. And it is finally insisted that under the "Farm Drainage Act", the construction of these several ditches, constituting a continuous system of ditches for drainage purposes, appellants acquired the right to have them forever remain open and an easment to flow water through the same, they having been constructed by common consent, or acquiesced in by all parties in interest, sufficiently to bring them within the terms of this act.

A reference to the answer to the original bill, and to the cross-bill filed by appellants will disclose that no such allegations of fact, either as a defense to the

original bill, nor as a basis for the relief sought by the cross-bill, were pleaded in this case, hence there was no issue before the court, involving either the second or third contentions of appellants. Even had there been such an issue presented, there was no evidence to which our attention has been called, or which we have been able to discover by a careful examination of the record which showed that any system of ditches was constructed, contemporaneously or otherwise, for the common drainage of the parcels of land owned by the respective parties.

The conditions existing for several years preceding the happening of the occurrences which lead to this litigation, as disclosed by the evidence may be briefly stated as follows: ~~appellee~~ Plaintiff acquired his tract of land by purchase from Elizabeth Merritt in 1897. ~~Appellant~~ Defendant E.I. Lacey had been owning his tract to the south thereof since ~~possibly prior to~~ at least 1876. The lands to the west now belonging to ~~appellant~~ Defendant E.I.Lacey were owned, at the time ~~appellee~~ Plaintiff purchased, by one Samuel R. Courson, and E.I.Lacey acquired portions of said lands during 1912 and '13.

At the time ~~Appellee~~ Plaintiff purchased his forty, Samuel R. Courson had a private road along the south line of this forty, running east and west by which he reached his lands. ~~We are not advised by the evidence by what right or title he held this road~~, but he appeared to have continued its use until in December 1908. The evidence ~~does~~ did not disclose to what extent, if at all, this road, while on ~~appellee's~~ Plaintiff's premises, was graded above the natural surface of the land,

and ~~we find~~ there was no evidence which tends to show that this road, while it remained on ~~appellee's~~ plaintiff's premises diverted or held back any portion whatever of the surface water coming from ~~appellants'~~ defendants' lands, or that it diverted any considerable portion of the surface water flowing over ~~appellee's~~ plaintiff's land. There ~~is~~ was some evidence that surface water flowed over this road some forty-five or fifty feet from ~~appellee's~~ plaintiff's west line, and thence north, and that poles had been laid across the road at this point. The evidence also disclosed that when ~~appellee~~ plaintiff bought his land, there was a rail fence along the north side of the "Courson Road", and remained there for some years afterwards.

Some two years before ~~appellee~~ plaintiff acquired this land, the servants of Mrs. Merritt, the former owner, constructed a ditch along the west side of this forty, just east of the west line, its southern end beginning just north of the rail fence north of the "Courson Road", and running thence north to a ditch running east and west across the north end of the forty,- the latter ditch running west until it emptied into Crooked Creek.

We are satisfied from the evidence that the ditch constructed by Mrs. Merritt along the west line of her forty, was a private ditch constructed solely for the benefit and convenience of her own land, and that it did not constitute and form any part of any system of ditches and drains leading from the premises of appellants. There can be no doubt ~~but that~~ This ditch ~~did~~ carried to the north, surface water coming from the premises of ~~appellants~~ defendants, but ~~we find no~~

There was evidence which tends to show that prior to 1908 any surface water ever came from ~~appellants'~~ defendants' premises, except as it was wont to flow in a state of nature. ~~Neither do we find~~ nor was any evidence in this record which tends to show that prior to 1908 ~~appellants~~ defendants or either of them maintained any ditches or drains on their lands, leading to, or connecting with ditches or drains on the lands of ~~appellee~~. plaintiff

Under the foregoing state of facts appellee was not obliged to keep the ditch along the west side of his lands open for the convenience of appellants, nor were they entitled to any order, requiring him to restore this ditch. (Toddard vs. Milnur 91 Ill., Ap., 568,-and cases cited.) Nor could appellants, because of the fact that surface water flowing from their premises, as it was accustomed to flow in a state of nature, after it reached appellee's premises was collected by this ditch and carried northerly over his lands, acquire an easement by prescription to have their condition ue to drain through this ditch.

The Court found by its decree that the natural flow of water over the lands in question was from the south to and the north, and over and across the lands of appellee, and this finding is fully supported by the evidence. Appellee, therefore, as the owner of the servient heritage was bound to receive all waters naturally coming from the dominant estate, in the manner only, and as it was wont to come in a state of nature. (Groff vs. Ankenbrandt, 124 Ill.,51; Hotel vs. Donnefoy,127 Ill.,653.)

It is insisted by appellants that the evidence dis-

closes that at the time appellee purchased his land, there was a ditch on said lands along the south side of the "Courson Road", which diverted surface water coming from their lands to the west side of appellee's land, and over and across this road to the north, near its west end, and into the ditch along the west side of his forty; and it is apparently argued that these two ditches constitute such a system of drainage as vest appellants with the right to demand that they be maintained, and that they be protected in their attempt to divert their surface water, by means of ditches on their own land, and discharge it at one point onto appellee's premises.

We do not understand how this matter, even if true, could be of benefit to appellants. Both of these ditches were entirely on the land of appellee; prior to 1928, neither ditch had been connected with any ditches or drains on the land of appellants. We find no evidence which tends to show that so long as the "Courson Road", remained on the land of appellee, that surface water coming from the lands of appellants or either of them, was diverted, dammed up, or held back upon their lands, either by the road itself, or by any ditch to the south thereof. If there was in fact any diversion of the ~~lands~~ surface water, during this period, it was after such water had reached the lands of the servient estate, and it could be no concern of appellants what plan or method appellee or his prior owners may have adopted in caring for surface water naturally cast upon them. After such water reached the servient estate, the owner thereof had a lawful right to deal with it in such manner as best suited his own interests, subject only to the qualification that when he discharged it upon the estate, servient to his

own heritage, he do so in the manner it was accustomed to go in a state of nature. When water from the dominant heritage reached his lands, appellee might allow it to flow over the surface thereof, as in a state of nature, unrestrained and unconfined. He might lawfully collect it by ditches and drains, and thus carry it from his premises, or into some depression thereon, and there impound it. But whatever the plan may be, the owner of the dominant heritage will not be thereby authorized, by ditches and drains constructed and maintained on his own lands, to divert the waters therefrom out of the natural course of drainage and discharge them in a body at any particular point on the servient heritage.

We find no evidence in this record which would warrant us in holding that appellants, or either of them, had acquired any easement by prescription, or otherwise, to connect ditches on their lands, with the ditches on appellee's lands for drainage purposes.

It further appeared from the evidence that ~~Appellee~~ plaintiff and Courson the owner of the private road in question had some difficulty over this road, which resulted, ultimately, in Courson abandoning the road on ~~appellee's~~ plaintiff's premises, and purchasing from ~~appellant~~ defendant A.E.Lacey, a right of way over a strip sixteen and one-half feet wide, across the north end of his forty for a private road. This purchase was made in December 1908, and the road immediately re-located across A. E. Lacey's land.

It also appeared ~~from the evidence~~ that after the roadway was abandoned across ~~appellee's~~ plaintiff's lands, he began the sub-

own heritage, he do so in the manner [illegible]
go in a state of nature. When water [illegible] the
heritage received its image, magnetic might either [illegible]
flow over the surface thereof, or in a state of nature,
unrestrained and unconfined. He might [illegible]
by ditches and drains, and thus carry it [illegible]
or into some depression thereon, and there [illegible]
but whatever the plan may be, the owner of the [illegible]
tage will not be thereby authorized, by ditches [illegible]
constructed and maintained on his own lands, to [illegible]
water therefrom out of the natural course [illegible]
discharge them in a body at any particular point [illegible]
[illegible]

We find no evidence in this record [illegible]
warrant us in holding that appellants, or [illegible]
had acquired any easement by prescription, or [illegible]
connect ditches on their lands, with the ditches [illegible]
lands for drainage purposes.

[illegible]

and thereon the owner of the private road [illegible]
some difficulty over this road, which [illegible]
in question landowning the road on [illegible]
purchasing from [illegible] A.L.Jacey, a [illegible]
strip sixteen and one-half feet wide, [illegible]
of the party for a private road. [illegible]
December 1908, and the road [illegible]
A. L. Jacey's land.

[illegible]

tivation of the strip formerly occupied by the road, and in plowing this land, some furrows were thrown towards the fence along the south line. This tended to form a sort of embankment or levee, somewhat above the natural surface of the land to the south, ~~and it is claimed that this embank-~~ ment obstructed and diverted the natural flow of surface water from appellants' premises, and that appellee should be enjoined from maintaining it. This contention would be correct, and appellants would be entitled to the relief prayed if the evidence fairly showed that this embankment, created in the manner indicated, did interfere with the natural flow ~~of surface water from appellants' lands.~~

~~The evidence discloses that~~ the embankment in question was located entirely upon the premises of ~~appellee~~, and as an incident to the ownership of said premises, appellee had a lawful right to maintain on his lands such buildings and structures, or to make such excavations, or to throw up such levees and embankments, or otherwise manage his property in such manner as his business interest, or whim may dictate; and an adjoining owner will be without remedy, unless he is able to show that his neighbor, in this dealing with his own premises, has invaded some legal right belonging to himself. It is not enough therefore for appellants to charge that appellee maintained this embankment, but they were required also to establish by their evidence that this embankment did in fact obstruct the natural flow of their surface water, and thus operated to their damage. If appellee's levee was adjacent to a higher levee maintained by

appellants, or to a ditch maintained on their own land, which effectually diverted their surface water before it reached appellee's levee, it could hardly be contended that the maintenance by appellee of his levee was such an invasion of appellants' rights as would require a court of equity to direct appellee to remove his levee. The evidence not only fails to show that water was diverted by this embankment, except at the southwest corner of appellee's land, but it does affirmatively appear that it was diverted by other causes, wholly disconnected therefrom. As to the conditions existing at the southwest corner of appellee's land, comment will be found at a later point in this opinion.

Defendant ~~Appellant~~ A.E.Lacey testified that "when Courson made his road on my land, he took a grader and made a good road; also that "he made a pond there to catch the water"; "this pond was located at the west end of the road and on the south side." "The pond had embankments to the west and north". He further testified that Courson made a ditch on the south side of his road, which went right west to the corner on a straight line; that this ditch drained the water which came off his land; that the water went down the ditch west and filled up the pond.

The evidence further disclosed that the crown of this road was some ten or twelve inches above the natural surface of the land to the south; that the pond was some twelve or fifteen feet wide north and south, and about twenty feet long east and west.

We are unable to determine just how long this pond was maintained, but it appears from the evidence to have been filled up, and the embankments torn down, prior to the summer of 1913. The parties disagreed as to the direction which water over-flowing from this pond went,- some testifying that it flowed north over the lands of plaintiff appellee,- others that it went west over the premises of defendant appellant A.H.Lacey. We do not find, however, that any controversy arose over the question of the drainage of surface water, so long as this pond was maintained and received the water coming from appellants' premises. After defendant appellant A.H.Lacey acquired the Courson land, he used this private road, over the lands of his father, as a means of ingress and egress to his land.

It is apparent, we think, from a consideration of the evidence in this record that appellants, and particularly the appellant A.H.Lacey, are alone responsible for the diversion of their surface water and that appellee is not responsible for conditions existing at the time the bill was filed. By selling the right of way for a road to Courson,-allowing him to grade the road above the natural surface of the land,-construct the ditch along the south side of the road, leading into the pond at the west, appellants, themselves, have diverted the surface water coming from their lands to the west, out of the course of its natural drainage, and are now seeking to discharge this water in a body upon the premises of appellee at his southwest corner. This, they have no lawful right to do.(Thorp vs.

Griffin, 77 Ill., Ap.505: Wagner vs. Chaney et al, 19 Ill., Ap.546; Mellor vs. Pilgrim, 7 Ill. Ap.306; Same vs. Same, 3 Ill., Ap.476.)

Appellants further contend that after Courson located his road on the A.R.Lacey land, he cut a ditch across it, connecting with the ditch along the west side of appellee's land, for thepurpose of carrying the water from the ditch south of this road over onto the premises of appellee, and into said ditch. Appellants claim that in opening the ditches opened by them during the fall of 1913 and in the summer of 1914, they were simply restoring the ditches which Courson had made. Even if this be so, there was no lawful right either in Courson or appellants, without the license and consent of appellee to construct and maintain such ditches for such purposes. Even if such a ditch had been constructed by Courson at the time his road was located across the A.R.Lacey land, and maintained thereafter continuously until the bill was filed, it could not have ripened into an easement by prescription. These acts on the part of appellants were a wrongful invasion of the rights of appellee.

Appellee had a lawful right to resist these attempt on the part of appellants. He had a right to close up the ditches made by them on his land; and the right also to erect at the southwest corner of his land, and along his south line immediately adjacent thereto such embankments and barriers as would effectually prevent the discharge of applicants' surface water upon him at this point. (Schmitz vs. Ort, 92 Ill., Ap.407.)

griffin, 77 Ill., p.[illegible] [illegible] v. [illegible], [illegible]
[illegible]; [illegible] v. [illegible], [illegible]
3 Ill., p.476.)

Appellants further contend that after [illegible]
ted his road on the A.L.Seely farm, he cut a ditch
connecting with the ditch along the [illegible]
land, for the purpose of carrying the water from the north
south of this road over onto the premises of appellee,
into said ditch. Appellants claim that in opening the
ditches opened by them during the fall of 1922 and in
summer of 1923, they were simply restoring the ditches
[illegible] had made. Even if this be so, there
[illegible]
and consent of appellee to construct and maintain
for such purpose. Even if such a ditch had been [illegible]
by Sourson at the time his road was located across
A.L.Seely farm, and maintained thereafter [illegible]
the bill was filed, it could not have ripened into
[illegible] by prescription. There was no [illegible]
were a wrongful invasion of the rights of appellee.

Appellee had a lawful right to [illegible]
tant on the part of appellants. If [illegible]
the ditches made by them on his farm; and by [illegible]
erect at the southwest corner of his farm, [illegible]
south line immediately adjacent thereto [illegible]
and barriers as would effectually prevent the [illegible]
appellants' surface water [illegible]
vs. Ott, 22 Ill., p.47.)

The evidence further disclosed that at the center of section ten, where these parcels of land corner, the natural surface of the land ~~is~~ was very nearly level, having a very slight fall to the north. The witnesses disagreed as to whether the lowest point from this corner ~~is~~ was north and east on the land of ~~appellee~~ plaintiff, or to the west upon the land of E. F. Lacey. A surveyor who testified for ~~appellants~~ defendants stated that ~~appellee's~~ plaintiff's land was slightly lower,-a matter of a half of a tenth of a foot. Forty-five feet west of the west end of this road, as it existed in 1913 and '14, there was a ditch beginning on the land of E. F. Lacey, running thence westerly connecting with a ditch running northerly near the center of his land, and having its outlet in Crooked Creek. It would seem reasonable at least, to believe that water collected by the ditch along the south side of the "Courson Road" and carried to the west side of A.H.Lacey's land and there discharged would be projected westward, and would be more likely to reach the ditch leading west through E.F.Lacey's land, than it would be to turn north and reach the lands of appellee. We are inclined to believe that the weight of the evidence warrants the conclusion that if the flow of water from this ditch be unobstructed and unimpeded, it would proceed westward over the lands of E.F.Lacey, rather than north over the lands of appellee.

~~There are several circumstances which warrant this conclusion. Appellants admit that~~ In the fall of 1913 ~~they~~ defendants built a levee across the west end of this road, and ditch. This levee was some twelve or fifteen inches in height, and thirty-five feet in length north and south. Its north end is ten feet north of ~~appellee's~~ plaintiff's south line and the levee or dam is located just west of his west line. Its effect ~~was~~ to obstruct the flow of the water from the ditch to the west, or to force it north through the ditch which ~~appellants~~ defendants had

made across the road and onto the premises of ~~appellee~~ plaintiff. ~~If these waters would naturally turn north and reach appellee's lands, no possible reason could exist for the construction of this levee.~~ In a conversation between ~~appellee~~ plaintiff and M.F.Lacey about this levee, in November 1913, Lacey stated that it was erected to stop the water from going west. This conversation ~~is~~ was not denied. It further appears from the evidence that sometime after this levee or embankment was constructed there was a heavy rain, and the embankment was washed out, and that pieces of wood which had been laid along the top, and embedded in the dam itself were carried to the west upon the land of M.F.Lacey, and the water flowed through the break in the dam to the west, although the ditch leading across the road into ~~appellee's~~ plaintiff's land was then open.

~~The evidence is quite clear, in fact it is not denied, that~~ In attempting to divert surface water carried to the west end of the ditch south of the "Courson Road", ~~appellants~~ defendants erected this dam, at the west end of the ditch; ~~that~~ they cut the ditch across the road, and repeatedly opened it into the premises of ~~appellee~~ plaintiff, ~~and~~ committed divers trespasses upon his premises in so doing. ~~We believe the trial~~ court decided the issues arising under both the original bill and the cross-bill in harmony with the weight of the evidence, and the law applicable thereto. Appellee was clearly entitled to the relief prayed for by him; appellants were seeking to take advantage of a situation created by their own conduct, contrary to law, and their cross-bill was properly dismissed for want of equity.

Finding no reversible error in the record herein, the decree of the Circuit Court will be affirmed.

Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 25th *day of April A. D. 1916.*

Clerk of the Appellate Court.

PINION

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the Seventeenth *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

199 I.A. 225

Charles Pauly & Edward C. Pauly,
Partners, etc.,
Appellants.

vs.

No. 49.

October Term, 1915

County of Madison,
Appellee.

ERROR TO
APPEAL FROM

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON. W. E. HADLEY.

Term No. 49. In the Appellate Court Agenda No. 20.

Fourth District.

October Term A. D. 1913.

See 199 Ill. App 225.

Charles Lauly and Edward C. Lauly, Partners etc., Appellants.	
vs.	Appeal from the Circuit Court of Madison County, Illinois.
Madison County, Appellee.	

McBride, J.

Appellants who are architects by profession, brought this suit against Madison County to recover compensation alleged to be due them for services rendered the County in the preparation of plans and specifications for a Court House Building. By agreement of the parties the cause was tried by the Court. The issues were decided in favor of appellee, and judgment in bar of the action and for costs rendered against appellants, to reverse which, this appeal is prosecuted.

On the 6th day of December 1909, the building committee of the Board of Supervisors of Madison County entered into a written contract with ~~appellants~~ plaintiffs, wherein it ~~is~~ was recited, "that whereas the party of the second part is about to erect an addition to the Madison County Court House", parties of the first part ~~are~~ were employed to prepare plans and specifications for the aforesaid building. By the contract for preparing plans and specifications and letting contract

Term No. 46. In the Appellate Court

Fourth District.

October Term A. D. 1910.

Martin, Judy and Edward F. Judy, Partners etc., Appellants.	Appeal from the Circuit Court of Madison County, Illinois.
vs.	
Madison County, Appellee.	

Abstract of Record.

Appellants were plaintiffs in the Circuit Court of Madison County, Illinois, and appellee was defendant. The plaintiffs filed their petition in the Circuit Court of Madison County, Illinois, for a writ of mandamus against the defendant, the County Clerk of said County, to compel the issuance of a license to plaintiffs for the preparation of plans and specifications for a Court House and Jail building. By agreement of the parties the cause was tried by the Court. The issues were found in favor of appellee, and judgment in bar of the action and for costs rendered against appellants, to reverse which, this appeal is prosecuted.

On the 6th day of December 1909, the building committee of the board of supervisors of Madison County, Illinois, made a written report, which contained, among other things, "that whereas the county of the County is about to enter on erection of the building [illegible] certain of the plans of the [illegible] and specifications for the proposed [illegible] and specifications [illegible] contract [illegible]

for the proposed work, ~~appellants~~ Plaintiffs were to be paid a sum equal to 3% on the total of all contracts as let, and 2% in addition thereto, if ~~appellants~~ Plaintiffs were retained to superintend the construction of the proposed improvement.

It appears ~~from the evidence~~ that the matter of providing the County witha Court House improvement, either in the way of a new building, or by building additions to the structure then existing had occupied the attention of the County Board for upwards of two years. At a meeting of the Board, held in December 1909, the building committee made a lengthy report to the County Board, reviewing the matter of improving the Court House, and suggested that the improvement be made by building a south wing to their present structure, then demolishing the center portion and rebuilding it, and then remodeling the north wing to make it conform to the other portions of the building. It was suggested that this work could be done in three sections, doing a section each year, and the estimate cost was placed at $150,000.00. In this report the building committee asked that they be authorized to employ an architect to prepare plans and specifications. This report was adopted and immediately thereafter, the contract with ~~appellants~~ Plaintiffs was entered into. At the January Meeting of the County Board in 1910, the action of the committee in contracting with ~~appellants~~ Plaintiffs was reported to the Board. This report advised the Board of the terms of the contract as to compensation to be paid ~~appellants~~ Plaintiffs, and that report was adopted.

~~Appellee~~ Defendants contends that the building committee never

for the proposed work, ~~[illegible]~~ were to be held a sum equal to 3% on the total of all contracts so let, and in addition thereto, if ~~[illegible]~~ were retained to [illegible] the construction of the proposed improvement.

It appears from the evidence that the [illegible] providing the County with a Court House improvement, either in the way of a new building, or by building an addition to the structure then existing had occupied the attention of the County Board for upwards of two years. At a meeting of the Board, held in December 1909, the building committee made a lengthy report to the County Board, reviewing the matter of improving the Court House, and suggested that the improvement be made by building a south wing to their present structure, then demolishing the center portion and rebuilding it, and then remodeling the north wing to make it conform to the other portions of the building. It was suggested that this work [illegible] in three [illegible] year, and the estimate cost was placed at $150,000.00. In this report the building committee asked that they be authorized to employ an architect to prepare plans and specifications. This report was adopted and in [illegible] thereafter, the contract with [illegible] was [illegible]. At the January Meeting of the County Board in 1910, the action of the committee in [illegible] was reported to the Board. This report advised the [illegible] of the contract as to compensation to be paid [illegible], and that report was adopted.

Appellee contends that the building committee never

had authority to contract with [illegible], and that the contract entered into is not binding upon the County. In support of this contention it is first insisted that no legal meeting of the County Board was ever held in December 1909, and it is next insisted that even if a legal meeting was held, the mere adoption of the report of the building committee did not confer upon it, authority to employ an architect, but that such authority would have to be conferred by a formal motion or resolution, expressly granting that power.

The evidence shows that at a special meeting of the County Board, held in April 1909, an order was entered of record, fixing the date of each monthly meeting thereafter for the period of one year. The date of the December meeting 1909 was fixed for Thursday the 2nd. In the caption of the December meeting it is recited: "The Board of Supervisors of Madison County 'met in regular session' in the Court House in the City of Edwardsville, the 1st day of December A. D. 1909". A part of the record of this meeting is written under date of December 1st; a part under the date of December 2nd. Thursday is indicated as December 1st,- also as December 2nd. The County Clerk who kept the record testified that but one meeting was held, and we find no order of adjournment from December 1st to December 2nd to complete the business of that meeting. It is apparent from the record that some mistake was made in entering the date of this meeting. Thursday could not have been both the 1st and the 2nd day also of December, and the Board could not have met in "regular session" on the 1st. Thirty of the thirty-one members of the Board were present at this meeting, and it would be a peculiar circumstance indeed, if these members should meet one day in advance of the legal date for the meeting, and proceed to transact

the public business, which they knew could only be transacted at a regular meeting, or a special meeting, called in the manner provided by law. In our judgment, it is more reasonable to conclude that the conflict in dates here shown is a mere error on the part of the clerk, than to hold that the Board met and transacted the public business in utter disregard and violation of the plain provisions of the law. We hold therefore that the meeting in question was a lawful meeting. "It will be presumed that the members of a County Board, as public officers have done their duty, that their meetings were properly convened, and at the time designated by law. (The People vs. Lyons, 108 Ill.Ap.,396; Loesnitz vs Boelinger, 127 Ind.422; 25 N.E.1037.)

Upon the second point urged by appellee, we do not regard the absence of a formal motion or resolution expressly authorizing the building committee to contract for plans and specifications, as affecting the rights of the parties herein. The mere fact that the County Board may have failed to observe the niceties of parlimentary procedure, cannot be urged by appellee to defeat the plain intention of the Board, if that intention may be ascertained from the various records in evidence before us. "All reasonable liberality must be accorded the minor deliberate bodies of the State; notably County Boards ····· where by reason of the character and vocation of the men comprising such bodies, the technicalities of procedure are not strictly enforced, nor perhaps fully understood. We must not expect nor demand that the records of such meetings should be made with the

accuracy and technicality of those of monetary corporations, conducted under the direction of skilled counsel; nor indeed of the legislature itself; (The people vs. Lynne, supra; Bartlett vs Eau Claire County, 112 Wis.,637.)

We think it apparent from the evidence that both the building committee and the County Board fully believed that the adoption of the report referred to, did confer the power exercised. The contract with appellants was entered into immediately following the adoption of this report at the December meeting, and it is not pretended that this committee, in entering into this contract, assumed to act for any one but the County. At the January meeting 1910 they reported the action taken together with the compensation to be paid ~~appellants~~ plaintiffs for the services contracted for. That report was approved by the County Board, and constituted, in our judgment, a ratification of the action of the committee. It is a familiar rule of law that where the proper interpretation of a contract or other writing is in issue the parties will be held to that interpretation, which they, themselves, have placed upon it; and their acts may be shown to determine such interpretation. (The People vs Adams, 65 Ill.,Ap.,283; Hamlee vs. Hambleton, 24 Ill.,605; Leavers vs Cleary, 75 Ill.,349.) A contract may be made with a county, by its board of supervisors, acting through a properly constituted committee or agent. (County of Crawford, vs Walter, 89 Ill.,App.,7). When the building committee made its report at the January Meeting, the County Board had ample opportunity, if it believed the committee had acted

accuracy and tenacionality of these or necessary con-
ventions, conducted under the direction of skilled coun-
sel; nor indeed of the legislature itself; (See Lyons v.
Lyons, Supra; Kendall vs. Van Cleave County, 111 Ill. 341.)

We think it apparent from the evidence that both the
building committee and the County Board truly believed that
the adoption of the report referred to, did confer the
power exercised. The contract with specifications was entered
into immediately following the adoption of the report at
the December meeting, and it is not pretended that this
[illegible]

They reported the action taken together with the contract
to be paid accordingly for the services contracted for. The
report was approved by the County Board, and constituted,
in our judgment, a ratification of the action of the com-
mittee. It is a familiar rule of law that where an express
authorization of a contract or other writing is in issue
the question will be held to that interpretation, which they,
themselves, have placed upon it; and their acts may be [illegible]
to determine such interpretation. (The People vs. [illegible],
vs. Cleary, 75 Ill. 349.) A contract may be [illegible]
county, by its board of supervisors, acting through a
properly constituted committee or agent. (County of [illegible]
[illegible] 61 Ill. [illegible]) [illegible]
made its report at the January meeting, [illegible]
ample opportunity, if it believed the committee [illegible]

without authority, or had exceeded its authority, to repudiate their action, and disavow its liability under the contract. Instead, however, the County Board "approved" the report, and it cannot at this late day be heard to repudiate the action of its committee. Where an agent acts without authority, or where he transcends his authority, it is the duty of the principal to repudiate the act as soon as he has been fully informed of what has been done in his name by the agent, else he will be bound by the act as having ratified it by implication. (Ward vs Williams, 26 Ill., 447; Bearing et al vs Butler et al, 69 Ill.,575.)

It is finally urged by appellee to sustain the finding and judgment of the trial court, that appellants cannot recover herein, for the reason that even if it be held that the building committee had power to contract for plans and specifications, it could only contract for plans and specifications for a court house improvement in harmony with the report made and adopted at the December meeting of the Board, the cost of which would not exceed approximately $150,000.00; that the plans as finally presented called for an entirely new building, at a cost estimated at $225,000.00; and that the building committee had neither power nor authority to bind the County to pay for such plans and specifications.

It is an elementary rule of law that contracts should be so construed as to carry into effect the intention of the parties, where such intention may be ascertained and given effect without doing violence to the language used.

It is also true that where one party to contract, either directly or by implication, induces or causes the other party to depart from the letter and terms of the contract in his performance thereof, he cannot predicate a defense upon such departure or variance. (Bennett vs Palmer, 128 Ill., App.626). Neither will a party to a contract have just cause for complaint, if the court shall compel and follow that interpretation of his rights thereunder, which he, by his acts and conduct has placed thereon.

While the report of the building committee referred to suggested a court house improvement by building an addition, wrecking and rebuilding a portion of the old court house, and remodeling another part and while the contract with appellants recites that the County is about to build an "addition" to the court house, we are well satisfied from the evidence that neither the building committee, the County Board, nor the appellants regarded the report of the building committee or the contract in question, as committing the County Board to any particular form of an improvement. We are also satisfied from the evidence that the variance or departure of which complaint is made was occasioned by the action of the County Board, and not by or ~~through the fault of appellants. We do not find~~ in this contract there was not even a crude or an informal attempt to describe the proposed improvement, either as to character, dimension, arrangement, or approximate cost, ~~nor can it be made that all these matters were understood by both parties to be reserved for the future determination of the building com-~~

It is also true that where one party to contract, either directly or by implication, induces or causes the other party to depart from the letter and terms of the contract in his performance of exact, he cannot [illegible] a [illegible] upon such departure or variance. (Bennett v. [illegible], 1[illegible] [illegible], App.626). Neither will a party to a contract [illegible] [illegible] of the [illegible], [illegible] law that interpretation of its rights [illegible], which he, by his acts and conduct has already [illegible].

While the report of the building [illegible] [illegible] an addition, wrecking and rebuilding a portion of the old court house, and remodeling another part and while the contract with appellants recites that the County is about to build an "addition" to the court house, we are well satisfied from the evidence that [illegible] the building committee, the County Board, nor the appellants regarded the report of the building committee or the order of in question, as constituting the County Board to any particular form of an improvement. We are also satisfied from the evidence that the variance or departure of which complaint is made was occasioned by the action of the County Board, [illegible] [illegible] that even a change or an informal release to [illegible] the proposed improvement, either in [illegible], [illegible] arrangement, or a [illegible] [illegible]

-7-

~~mitted of the County Board~~. ~~In support of this conclusion, we find that~~ at the January meeting 1910, the building committee when it reported the contract, likewise reported a trip of inspection made by it to various county seats to inspect modern court house buildings for the purpose of obtaining ideas to be utilized in making the contemplated improvement. At the February meeting of the County Board, arrangements were made for a tour of inspection by the whole Board for a like purpose, and that trip was in fact made. ~~Incidentally such a conduct on the part of the committee and the County Board is not in harmony with the view that they considered themselves absolutely committed to the making of such an improvement as suggested in the report of the building committee.~~ It is, however, in harmony with the view that the character and form of that improvement was reserved for the future consideration of the building committee and the County Board. The substantial thing which appellee was to obtain from appellants under the contract, was plans and specifications for a court house improvement,- the form which that improvement should take was a matter of detail only.

At the March meeting of the County Board, 1910, ~~another significant circumstance~~ occurred. On the same day that the Board met in that month a mass meeting of citizens from various parts of the County assembled at Edwardsville, and adopted resolutions protesting against the building of additions, and the remodeling of their then building, and calling upon the County Board to provide an entirely new court house building. At the afternoon session of the Board, the secretary of this meeting attended before the

Board, and presented these resolutions, which were read before the open Board, and thereafter adopted and spread upon the records of the County Board. The County Board did not at that time, or at any other time withdraw from the hands of the building committee the matter of procuring plans and specifications, nor instruct them in any manner as to what they should do. After this demonstration, it appeared that the building committee concluded that what the citizens and the County Board really wished in the way of a court house improvement, was a new building, and they directed ~~appellants~~ County to proceed accordingly. That the building committee did order appellants to prepare plans and specifications for a new building, and that such action on the part of the committee was occasioned by the adoption of the resolution aforesaid, clearly appears from a report made by the committee to the board at its January meeting 1911. Under this evidence, it cannot be reasonably contended that appellants were in fault in submitting plans and specifications for a new building, when they did so under the express direction of this committee, and where it further appears that the committee acted in harmony with the will of the County Board, as expressed by the adoption of the resolution above mentioned.

The evidence disclosed that complete plans and specifications were delivered to the building committee about the 1st of August 1910 and presented to the County Board at its regular meeting in that month, since, which time such plans and specifications have remained in the

possession of the County Board. ~~Our attention has not been called to~~ There was no evidence of any objection, fault, criticism or other complaint then or at anytime thereafter made to either the plans or the specifications, or to any disclaimer or denial of the right and authority of the committee to procure them.

While it is true that these plans were never formally accepted and adopted by the County Board, the evidence does in our judgment show that these plans were recognized, and were made the basis of official action taken by the Board on the same day they were submitted to it. In the record of theproceedings of the Board at this meeting, we ~~find~~ affirmed the following: "The public building committee submitted plans and specifications relative to '<u>the proposed new court house</u>', and no action being taken same was continued until the afternoon session". At ~~what we take to be~~ the afternoon session of the same meeting, ~~we find~~ a motion was duly made, seconded, and adopted which provided: "The building of '<u>the proposed new court house</u>' was referred to the Judiciary committee to act in conjunction with the States Attorney, to have said proposition, as to the building of a new court house voted on 'for' or 'against' at the November election 1910, and to see that said issue is placed on the ballot".

To what "<u>proposed new court house</u>" did the Board have reference in this action? Our attention has not been called to any "<u>proposed new court house</u>", or to any plans

possession of the County Board. We mention this not been called to any objection, [illegible] complaint then or at anything thereafter [illegible] the plans or the specifications, or to any denial of the right and authority of the [illegible] procure them.

While it is true that these plans were formally accepted and adopted by the County Board, the evidence does in our judgment show that these [illegible] mized, and were made the basis of official action [illegible] the board on the same day they were submitted to it. In the record of the proceedings of the board at [illegible] meeting, we find the following: "The building committee [illegible] mitted plans and specifications relative to 'the proposed new court house', and no action being taken some was continued until the afternoon session". [illegible] the afternoon session of the same meeting, [illegible] motion duly made, seconded, and adopted which provided: "The building of 'the proposed new court house' was referred to the judiciary committee to act in conjunction with the State Attorney, to have said proposition [illegible] at the November election 1910, and to see that said [illegible] is placed on the ballot".

[illegible] 'Pleasant [illegible] Court House' [illegible] have reference in its opinion. Our attention [illegible] United States "Proceed and Result v. [illegible]",

and specifications or any estimate of cost of any "proposed new court house" except those prepared by appellants, and which came before the Board on that day. The County Board in its own record refer to these plans and specifications as being for "the proposed new court house". No theory or explanation has been offered to account for this action of the County Board. Coming at the time and in the manner it did, it at least tends to show a recognition and implied acceptance of these plans and specifications. Having retained these plans without objection or criticism, and having made use of them as the basis for official action, we can see no reason why the County should not pay therefor.

"It is a general principle of almost universal application that where a county has power originally to do a particular thing, it has the power to ratify and make valid an attempted effort to do the same thing, although the same may have been done defectively, informally and even fraudulently, in the first instance. Upon the strength of this principle municipal corporations have been estopped from denying their liability to pay for benefits received, in some cases where there was no contract at all, and even in cases where there was an absence of power to make the contract. Where a county receives and retains substantial benefits under a contract which it was authorized to make, but was void because irregularly executed, it is liable in an action brought to recover the reasonable value of the benefits received." (7 R.C.L. 946, Sec.32.)

At the September meeting of the County Board the

and specifications or any estimate of costs. I say "[illegible] new court house" except those prepared by Opie Lamb, and which came before the Board on that day. The County Board in its own record refer to these plans [illegible] specifications as being for "the proposed new court house." [illegible] theory or explanation has been offered to [illegible] action of the County Board. Leaving at the [illegible] manner it did, it at least tends to show [illegible]

ing retained these plans without objection or criticism, and having made use of them as the basis for an [illegible], we can see no reason why the County should not pay [illegible].

"It is a general authority of [illegible] application that where a county has power and [illegible] a particular thing, it has the power to ratify and make valid an attempted effort to do the same thing, although the same may have been done defectively, irregularly and even fraudulently, in the first instance. [illegible] of this principle municipal corporations have been [illegible] from denying their liability to pay for benefits received, in some cases where there was no contract at all, and even in cases where there was an absence of power to make the contract. Where a county receives and retains [illegible] benefits under a contract which it was not [illegible] but was void because irregularly executed, it is liable in an action brought to recover the reasonable value of the benefits received." (7 [illegible] 346, [illegible])

At the September meeting of the County Board the

Judiciary committee submitted a formal resolution, providing for a bond issue in the sum of $350,000 for a new court house, same to be voted upon at the next November election. This resolution was adopted; the proposition submitted to the voters of the County, and defeated. At the January meeting 1911 the matter of proceeding with a building according to the plans in question was laid over until the February meeting, and was then finally voted down. Thereafter nothing seemed to have been done in reference to these plans. At the January meeting 1911 one of ~~appellants~~ plaintiffs attended before the Board, and offered in case there was any objection to either the plans or specifications, to modify them to meet the wishes of the Board. No complaint was suggested. Afterwards, ~~appellants~~ plaintiffs by a written communication to the Board offered to proceed and advertise for bids. This offer was not considered.

~~The evidence tended to show that appellants did everything they could do in the performance of their contract, and that full performance was prevented by the action of the County Board. The evidence disclosed that appellants~~ plaintiffs did a great amount of work in the preparation of these plans and specifications. They met with the building committee from two to four times each month from the time the contract was entered into until the plans were finally finished in August following. Many modifications, changes and alterations were made in the plans and drawings in order to produce the final results which the committee had in mind, and the plans and specifications as finally completed

were acceptable to, and represented the orders of the building committee.

It is our conclusion, under the evidence before us, and the law applicable thereto that under their contract of employment appellants are entitled to recover compensation for the services rendered by them, and that the trial court erred in deciding the issues in favor of appellee. (I.S.&M.S.Ry.Co. vs Richards, 152 Ill.,59; Village of Lockport vs. Shields, 87 Ill.,Ap.,150.)

It would unduly extend this opinion to consider in detail the rulings made by the trial court upon the propositions of law submitted. Insofar as they conflict with the views herein expressed, we hold them to be erroneous, and we assume that upon another trial they will be made to conform to the views held by this Court.

For the reasons indicated, the judgment of the Circuit Court is reversed, and the cause remanded to that Court for a new trial, in conformity with the views herein expressed.

Reversed and Remanded.

Higbee J. dissents.

Not to be reported in full.

were accountable to, and represented the owners of the building [illegible].

It is our conclusion, under the evidence before us, and the law applicable thereto that under such a contract of employment appellants are entitled to recover reasonable compensation for the services rendered by them, and that the trial court erred in deciding the issues in favor of appellees.

(Lockwood vs. Shields, 87 Ill. App. 120.)

It would unduly extend this opinion to consider in detail the rulings made by the trial court upon the propositions of law submitted. Inasmuch as they conflict with the views herein expressed, we hold them to be erroneous, and we assume that upon another trial they will be made to conform to the views held by this Court.

The judgment of the Circuit Court is reversed, and the cause remanded to that Court for a new trial, in conformity with the views herein expressed.

Reversed and remanded.

Mr. Justice L. dissents.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 24th *day of April A. D. 1916.*

Clerk of the Appellate Court.

PINION

4A244

1618

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the Seventeenth *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

199 I.A. 244

L. T. Epps, for the use of
L. C. Braasch,
Appellee.

vs.

No. 54.

October Term, 1915

Illinois Central Railroad Co.,
Appellant.

ERROR TO
APPEAL FROM

City COURT

East St. Louis COUNTY

TRIAL JUDGE

HON. ROBT. H. FLANNIGAN.

Term No. 54. In the Appellate Court, Agenda No.65.

Fourth District.

October Term A. D. 1915.

L. T. Epps for the use of I. C. Braasch, Appellee.	
vs.	Appeal from the City Court
Illinois Central Railroad Co., Appellant.	of East St.Louis, Illinois.

Mcbride, J.

This was a garnishee proceeding, upon which the appellee recovered judgment against appellant for $55.00, and costs of suit. The appellee filed no brief in this case but we have determined to examine the record and decide the case upon its merits.

It appears from the record in the case that on the trial below appellee claimed that appellant was indebted to L. T. Epps for wages and that Epps was indebted to Braasch. The appellant denied that Epps was in its employ or that it was in any manner indebted to Epps for services. The only evidence introduced by plaintiff to show these facts was that of the appellee Braasch, who testifies, in substance that he was informed by Epps that he was working for the appellant. He says, "He, (Epps) came up here and asked me to release his check, that it was tied up; he offered me

Term No. 54. In the Appellate Court,

Fourth District.

October Term A. D. 1918.

[illegible] T. Lape for the use of [illegible] T. Lorenzen, Appellee,	
vs.	Appeal from the City Court
Illinois Central Railroad Co., Appellant.	of East St. Louis, St. Clair

Abstract.

This was a garnishee proceeding, wherein the [illegible] appellee recovered judgment against appellant for $[illegible] and costs of suit. The appellee filed no brief in this [illegible]

[illegible]

[illegible] only evidence introduced by plaintiff to show [illegible] was that of the appellee herein, who testified, in [illegible] [illegible] appellant: He says, "He, (I so) came up here [illegible] [illegible] that it was time [illegible]

fifteen dollars, so I presumed he was working for them; he also told me he had worked at a couple of other places, and he was too good a man; he cleaned up the yard too quick, and they sent him down there on the Yazoo & Mississippi Valley. I don't know whether the I. C. runs in Arkansas but the I.C. will hire you and send you on the Yazoo & Mississippi.Valley. I don't know what road runs into Helena, Arkansas. He told me he was working for the Yazoo & Mississippi Valley but the I. C. hired him. I know the I. C. said him because he told me his check was tied up." He also stated he thought he was getting thirty-five or thirty-seven cents per hour but does not state how long he worked or give any definite amount that is due, and we think this evidence is too uncertain and too indefinite to sustain a judgment in the face of a flat denial by appellant that it was not in any manner indebted to Epps.

There is a further objection urged against this judgment. It appears from this evidence that the wages earned and sought to be garnisheed in this case were earned and payable in the State of Arkansas and that the cause of action arose in the State of Arkansas. The appellee Krausch, in his testimony further says, "I was in Little Rock, Arkansas, when I loaned him the money. He was living in Hulbert, Arkansas. I suppose he came from there to my place to borrow. I loaned him fifty dollars in cash. When I started this case here in East St. Louis he was then in the State of Arkansas." It further appears from this record that appellee

[illegible] [illegible], as I remember he [illegible]
He also told me he had worked at a [illegible]
and he was too good a man; he [illegible]
and they sent him down the [illegible] on the [illegible]
valley. I don't know whether the I. C. runs [illegible]
but the I.C. will hire you and send you on the [illegible]
Mississippi valley. I don't know what road [illegible]
Indian, Arkansas. He told me he was working [illegible]
a Mississippi valley but the I. C. hired him. [illegible]
I. C. and him because he told me his check [illegible]
He also stated he thought he was getting [illegible]
thirty-seven cents per hour but does not [illegible]
worked or give any definite account that is [illegible]
it was not in any manner indebted to [illegible].

There is another objection urged against [illegible]
[illegible]. It appears from this evidence that [illegible]
and equally in the State of Arkansas and that [illegible]
action arose in the State of Arkansas. [illegible]
[illegible] testimony further says, "I was in [illegible]
[illegible], when I loaned him the money. [illegible]
[illegible]
[illegible]. I loaned him fifty dollars in [illegible]
this case here in dispute. Looks as [illegible]
[illegible]." It further appears from this [illegible]

Ziegs was not personally served with process, and that being true the court was without jurisdiction to hear and determine this suit. It is provided by statute, "That wages earned out of this state and payable out of this state shall be exempt from attachment or garnishment in all cases where the cause of action arose out of this state, unless the defendant in the attachment or garnishment suit is personally served with process. And if the writ of attachment or garnishment is not personally served on the defendant the court, justice of peace or police magistrate issuing the writ of attachment or garnishment shall not entertain jurisdiction of the cause but shall dismiss the suit at the cost of the plaintiff." Kans Revised Statute of 1911, Chapter 62, sec. 34 a.

We think that in as much as the defendant in the attachment had not been personally served with process that the court was without jurisdiction to try the cause and the judgment is reversed.

JUDGMENT ON HOLD.

Not to be reported in full.

[illegible] was not personally served with [illegible], [illegible]
[illegible] the court was without jurisdiction [illegible]
[illegible] this suit. It is provided by [illegible]
[illegible] cause out of this state may [illegible]
[illegible] shall be served [illegible] attachment [illegible]
[illegible] the cause of action arose out of [illegible],
unless the defendant in the attachment or garnishment [illegible]
[illegible] [illegible] [illegible]
[illegible] or garnishment is not personally served or [illegible]
defendant the court, justice of peace or [illegible]
[illegible] the writ of attachment or garnishment [illegible]
[illegible] jurisdiction of the cause but [illegible]
[illegible] at the [illegible] of the plaintiff." [illegible] revised statute
of 1921, chapter 62, sec. 14 a.

We think that in as much as the defendant in the attachment had not been personally served with process that the court was without jurisdiction to try the [illegible] and the judgment is reversed.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 25th *day of April A. D. 1916.*

Clerk of the Appellate Court.

NOINI

199 I.A. 251

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the Seventeenth *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Prosper J. Soucy,

Appellant.

vs.

No. 58.

October Term, 1915

Jacob Rothschild,

Appellee.

199 I.A. 251

ERROR TO
APPEAL FROM

City COURT

East St. Louis COUNTY

TRIAL JUDGE

HON. W. M. VANDEVENTER.

Term No. 58. In the Appellate Court Agenda No. 26.

of Illinois, Fourth District.

October Term A. D. 1915.

Prosper J. Soucy, Appellant,	)	
vs.	)	Appeal from the City Court,
Jacob Rothschild, Appellee.	)	East St. Louis, Illinois.

Boggide, J.

Appellant filed his bill in the lower court praying to secure a mechanic's lien upon the premises described in the bill to secure the amount of five hundred [illegible] dollars and ninety cents ($[illegible]). Appellee procured a decree for Four Hundred Sixty Dollars and Ninety Cents ($460·90) from the rendition of which the appellant prosecutes this appeal and claims that the amount of the decree was too small, and appellee assigns cross errors alleging that he was entitled to credits that he did not receive.

It appears ~~from the record~~ that in the Fall of 1914, ~~the~~ defendant ~~appellee~~ was about to erect a dwelling and store room on the premises owned by him in East St. Louis, in which there would be required a considerable amount of plumbing. Sam Jones, a friend of Paul Becker, recommended to ~~appellee~~

that he employ Mr. Meeker to do this work. Meeker called upon ~~appellee~~ defendant and talked with him about his plumbing, and, as he claims, told ~~appellee~~ defendant that ~~appellant~~ plaintiff was interested with him in the plumbing business, and estimates were submitted by Meeker to ~~appellee~~ defendant upon his work of plumbing; that before the contract was entered into Meeker and ~~appellee~~ defendant had a further conversation in which Meeker agreed to purchase some clothing of ~~appellee~~ defendant if he obtained this contract, and the contract was awarded to Paul Meeker on September 16th, 1914, and a written contract was then prepared and signed by Paul Meeker and the ~~appellee~~ defendant, by which contract it was provided that Meeker was to do the plumbing for ~~appellee~~ defendant and have it completed by the first of December 1914; that it was to be performed in a good substantial and workmanlike manner and in conformity with the plans and specifications made by ~~Mueller & Broekmeyer~~, **architects.** ~~And~~ It was further provided in said contract "that should the party of the second part fail to have the work finished on or before the time above specified, December 1, 1914, he shall pay to or allow the party of the first part the sum of two dollars for each and every day thereafter that said work shall remain incomplete" and the price stipulated to be paid for the work was One Thousand Fifty Dollars ($1050.00). Meeker entered upon the performance of this contract, but did not complete the work by December first, ~~appellee contends that the work was not completed according to the terms of the agreement.~~ Prior to the filing of the bill by

plaintiff defendant
~~appellant~~ ~~appellee~~ secured a loan upon said premises for the amount of Four Thousand Dollars ($4000.00) and Nine Hundred Two Dollars ($902.00) was held by the mortgagee for the payment of the plumbing, and afterwards by the consent of all persons interested Five Hundred Dollars ($500.00) was paid by the mortgagee to the ~~appellant~~ plaintiff. ~~[illegible]~~ Plaintiff claimed ~~appellant~~ that there was extra work done and an allowance was made to him for a small amount for extra work.

It was further ~~is~~ contended by plaintiff ~~appellant~~ ~~in this case~~ that while the contract for the performance of this work was signed by Meeker in his individual name, that the contract was, in fact, entered into by him for the Lost St. Louis Plumbing and Heating Company owned by the plaintiff ~~appellee~~. ~~[illegible]~~ ~~the Lost St. Louis Plumbing & Heating Company, or knew that~~ they were interested in the contract, ~~but~~ Defendant claimed that his contract was solely with Meeker and that he ~~is~~ was entitled to credit for the clothing purchased by Meeker and also for damages for not completing the work within the time specified in the contract.

~~This several errors have been assigned by appellant, and cross errors by appellee, the whole subject-matter in dispute that this court is called upon to determine, is covered by, and will be considered under three propositions:~~

~~First:- Did the Court err in allowing the appellee Rothschild to be credited with One Hundred Five Dollars ($105.00) for clothing sold by him to Meeker.~~

The evidence was conflicting as to whether defendant had knowledge of the partnership between the plaintiff. Meeker started the work, but the contract was assigned to plaintiff and he completed it.

Second:- Did the Court err in refusing to allow appellee Two Hundred Dollars ($200.00) as liquidated damages for failure to complete contract by December first.

Third:- Did the Court err in apportioning the costs equally between the complainant and defendant.

The first and third errors are assigned by appellant and the second one by appellee.

The first proposition will have to be determined upon the conduct and knowledge of the parties at the time of entering into the contract for the doing of the plumbing and the purchasing of the clothing in question. It appears from the evidence of ~~appellant~~ plaintiff that after Hecker had been introduced to ~~appellee~~ defendant by Mr. Jones and recommended by him to do ~~appellee's~~ defendant's work, that Hecker called upon ~~appellee~~ defendant, and that in company with him went to ~~appellant's~~ plaintiff's office. Appellant says that appellee while there was told that appellant was behind this contract, and Hecker is not certain, but thinks he told him that appellant was partners with him, and an estimate was there prepared by Hecker. The appellee, however, denies that he received any information from them as to the partnership, or that Hecker prepared and submitted to him any estimate. Hecker says he is not certain whether the estimate was given to him or sent by mail. It appears from the evidence that Hecker did the work and that so far as appellee knew, or could see, appellant had nothing to do with the performance of the work until after the appellant obtained an assignment of the contract from Hecker

Second:- Did the Court err in refusing, as claimed, to allow the [illegible] for failure to complete contract by December last.

Third:- Did the Court err in apportioning the costs equally between the contractors and defendant.

The first and third errors are analyzed by [illegible] fact and the second one by [illegible].

The first proposition will have to be determined on the conduct and knowledge of the parties at the time of entering into the contract for the doing of the plumbing [illegible]

From the evidence of appellant that after [illegible] had been introduced to [illegible] by Mr. [illegible] and recommended by him to do [illegible] work, that Reeder called upon [illegible], and that in company with him went to [illegible] office.

[illegible] signing the contract, and Reeder is not certain, but thinks he told him that [illegible] was [illegible] with him, and an estimate was there prepared by Reeder. The appellee, however, denies that he received any information from them as to the [illegible], or that Reeder represented [illegible] submitted to him any estimate. Reeder says he is not certain whether the estimate was given to him or not by [illegible]. It appears from the evidence that Reeder did the work and that so far as appellee knew, or could see, appellant had nothing to do with the performance of the work until after the appellant abandoned the assignment at the request of Reeder

in February 1915. There were some circumstances in evidence tending to show that appellee did know, or ought to have known, that appellant was interested in this contract, but appellee denies that he had any knowledge of it, and there are other circumstances that tend to show that he supposed he was dealing with Hecker individually and solely in this matter until in February when Hecker quit the work and made an assignment of the contract to appellant; we are not able to say that in the finding of the Court, that appellee understood and believed that he was contracting with Hecker individually and that he sold the goods in question to Hecker, as Hecker says, with the expectation that they would be deducted from the contract when completed, was manifestly against the weight of the evidence, or that it was inequitable and unjust under all of the circumstances. As there is some evidence in this record which fairly tends to support appellee's contention, this Court cannot disturb that finding. Supreme Lodge of Mutual Protection vs. Meister, 204 Ill. 527.

As to the second proposition, it is claimed by appellee that the Court erred in not allowing him a credit of Two Hundred Dollars ($200.00) as liquidated damages under the terms of the contract. It is contended by appellant that two dollars per day stipulated in the contract was a penalty and that evidence should have been introduced as to the amount of damages really sustained, while appellee contends that under the law, the stipulation amounted to liquidated

in February 1910. There were some circumstances in evidence tending to show that appellee did not, [illegible] with [illegible], and [illegible] but appellee denies that he had any knowledge [illegible], and there are other circumstances that tend to show [illegible] supposed he was dealing with Decker individually [illegible] in this matter until in February when he [illegible] and made an assignment of the contract [illegible] are not able to say that in the finding of the court, that appellee understood and believed that he was dealing with Decker individually and that he sold the goods to him [illegible] as Decker says, with the expectation that [illegible] would be deducted from the contract then [illegible], was manifestly against the weight of the evidence, or that it was inequitable and unjust under all of the circumstances. As there is some evidence in this record which [illegible] to support appellee's contention, this court cannot disturb that finding. Supreme Lodge of Mutual Protection v. [illegible], 204 Ill. 527.

As to the second proposition, it is claimed by appellee that the court erred in not allowing [illegible] of Two Hundred Dollars ($2[illegible]) [illegible] under the terms of the order [illegible]. It is contended [illegible] two dollars per day stipulated in the contract [illegible] and that evidence should have been introduced [illegible] damages [illegible] that under the law, the stipulation [illegible] liquidated

damages and no evidence was necessary. As we view the facts in this case, it will not be necessary to determine whether the stipulation amounted to a penalty or liquidated damages. In either case it amounts practically to a forfeiture, and was waived by appellee, both by his conduct and declarations. After Meeker had left the work of plumbing and appellee knew that the contract had been assigned to appellant, and on March 22nd, 1915, appellee wrote appellant a letter in which he stated: "If this work is not completed as provided under said contract within a reasonable time, I shall secure someone else to complete said work, and the costs thereby incurred from said contract shall be deducted from said contract price of One Thousand Fifty Dollars," appellant immediately sent his men to do what was necessary to complete the contract, and, as he contends, did complete it. On several occasions appellee [illegible] he was ready and willing to pay the contract price if they would deduct the One Hundred Five Dollars ($105.00) for the clothing, and when he made his answer he did not set up and claim that appellant was owing, or that there should be deducted from the contract price this or any other amount. It is true in his answer he makes a recitation of the fact that the contract was to "be completed by December 1st, 1914, in default of which, Meeker shall allow Rothschild two dollars for each day thereafter that the work is not completed, and that said work was not, if at all, completed until March 18, 1915;" but he does not claim in his answer that [illegible] of

~~The failure to complete the contract the penalty or liquidated damages and expense of loan.~~ In addition to this when ~~appellee~~ defendant had this loan he provided a fund of Nine hundred and Two Dollars ($902.00) and left same in the hands of the mortgagee to pay the plumbing bill, and took possession of the house without at any time making any claim for such damages until during the trial of this suit. It seems to me under the circumstances, and especially under the statement made in [illegible] to what he would exact if the contract was not completed, are sufficient to constitute a waiver of a provision in the nature of this one, and we believe it was waived, and that he is not now entitled to have deducted from his contract price the amount of Two Hundred Dollars either as a penalty or as liquidated damages.

The third and last contention is that the Court erred in the apportionment of the costs. It is a well established rule and requires no citation of authorities that the Chancellor may apportion the costs in cases of this character, and such apportionment will not be disturbed unless it is of such a character as to be oppressive and manifestly unjust. The evidence in this case discloses that the appellee had offered at different times to pay this claim if they would allow him credit for the one hundred five Dollars for the clothing. Indeed, appellant himself states that appellee offered this, and it is very clear to our minds that the whole case and litigation could have been settled at any

time by the allowance of the one hundred five dollars, which we have held he was entitled to receive, and this being true we cannot say that it was unjust to require the appellant to pay one-half of the costs of this proceeding.

After a careful examination of this record we are not able to say that the finding of the Court was manifestly against the weight of the evidence, nor that any serious errors have been committed in the trial of this case, and the judgment of the lower court is affirmed.

Not to be reported in full.

time by the ability once of two one [illegible]
which we have made he was [illegible]
being, true we cannot say that it [illegible]
the accusations to any one-half [illegible]
[illegible]

There is careful examination of [illegible]
not able to say that the findings of [illegible]
[illegible] against the weight of the evidence, [illegible]
i.e. charges have been committed in the [illegible]
[illegible]

not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 25th *day of April A. D. 1916.*

Clerk of the Appellate Court.

PINION

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the Seventeenth *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Hester Duncan, Administratrix, of the Estate of Waverly Duncan, deceased,

Appellant.

vs.

No. 65.

October Term, 1915

Centralia Coal Company,

Appellee.

199 I.A. 255

ERROR TO

APPEAL FROM

Circuit COURT

Larion COUNTY

TRIAL JUDGE

HON. THOMAS I. JETT.

Term No. 65. In the Appellate Court Agenda No.35.

Fourth District.

October Term, A. D. 1915.

Hester Duncan, Administratrix of the estate of Waverly Duncan, Deceased, Appellant. vs. Centralia Coal Company, Appellee.	Appeal from the Circuit Court of Marion County, Illinois.

McBride, J.

At the conclusion of the evidence for the plaintiff the court, at the request of the defendant, directed a verdict for defendant upon which judgment was rendered against the plaintiff, to reverse which this appeal is prosecuted.

~~It appears from the record in this case that~~ Waverly Duncan was killed at ~~appellee's~~ defendant's mine on January 21, 1914, and ~~that~~ he left surviving him one child named Hester Duncan, and a widow, but he and his wife had not lived together for several years prior to his decease. ~~Appellee~~ Defendant was operating a coal mine near Centralia, Illinois, and there were used in connection with the operation of such mine four tracks, and ~~while it is not very clear from the evidence just how these different tracks were located~~ they appeared to have been located with what is called the run around track on the west, the egg track next to it on the east, the lump track next and the screening track next. They were all lo-

[illegible] No. 68. In the Appellate Court [illegible]

[illegible]

[illegible]

[illegible] Dunoon, Administratrix of
the estate of [illegible] Dunoon, Deceased,

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

In the conclusion of the evidence [illegible] plaintiff [illegible] defendant, directed a verdict for defendant upon which judgment was [illegible] plaintiff, to reverse which [illegible] appeal is [illegible].

[illegible]

[illegible] Dunoon was killed at [illegible] mine on [illegible], 1924, [illegible] left surviving him one child [illegible] several years prior to his decease. [illegible] operating a coal mine near Centralia, Illinois, [illegible] used in connection with the operation [illegible] and [illegible] very close [illegible] loaded with what is called [illegible] the work, the car threw [illegible] and the [illegible] lo-

cated west of the hoisting shaft. The run around track was used for the purpose of supplying the mines with cars to be loaded, and at the time in question they had been engaged in loading a car of lump coal which was standing upon the lump track, ~~and~~ The business of the deceased made Duncan was to trim the car after it was loaded. He threw off the refuse matter between the tracks and then afterwards it became his duty to take this refuse matter and throw it on what was called the dump west of the run around track. The cars on the run around track ~~are~~ were operated by means of a cable working over a drum moved by an engine and called a car puller. On the day in question this car puller was operated by Harry Brown, the superintendent of the mine. The injury happened south of the mine ~~and~~ where there was an up grade to the mine, ~~from the mine to the south.~~ After the deceased had thrown off the refuse matter from the car he then took a wheel barrow and picked up this refuse matter between the egg and lump tracks and was wheeling it out upon the wheel barrow, running it forward until he reached the egg track, and then turned backward and pulled the wheel barrow over the egg track, and had just pulled it over the east rail of the run around track when the car struck him and killed him. It also appeared that two of the witnesses had attempted to warn him of the approach of the car by calloging at him.

The declaration ~~[illegible]~~ alleged "That it was the duty of the defendant to furnish the plaintiff's decedent with a reasonably safe place in which to work and to exercise reasonable care to give him notice and

warning of the approach of any cars upon or along said side track or switch track, so as not to endanger the life of the plaintiff's decedent or to render his working place unsafe. Yet the said defendant did not regard its duty in that behalf but on the contrary negligently and carelessly moved and operated the said cars upon and over the said side track or switch track without giving to the plaintiff's decedent any notice or warning of the approach of said cars; whereby and by means whereof while plaintiff's decedent was working pursuant to his employment and crossing the said track the said car, without any notice or warning to the plaintiff's decedent, ran to, against, upon and over the deceased." Whereby he was instantly killed. The declaration also alleged that the defendant had elected not to operate its mine under the compensation act.

It is urged by counsel for appellant that it was the duty of appellee to furnish the deceased with a reasonably safe place to work and that the court erred in directing a verdict. It is true that under the law such is the duty of the master, and under the allegations of this declaration the plaintiff should not be defeated of any of her rights by reason of any contributory negligence or assumed risk of the deceased. It is, however, true that before the appellant could recover she must show that the appellee was guilty of some negligence. It has not been pointed out by counsel what particular negligence the appellee was guilty of. The fact that it was required to furnish the deceased with a reasonably safe place to work did not deprive the

warning of the approach of any train or other moving side track or switch track, so as not to endanger the life of the plaintiff's decedent or to render his working place unsafe. Yet the said defendant did not repair the duty in that behalf but on the contrary negligently and carelessly moved and operated the said cars upon and over the said side track or switch track without giving to the plaintiff's decedent any notice or warning of the movement of said cars; whereby and by means whereof while plaintiff's decedent was working upon to the employment and operating the said track the said car, without any notice or warning to the plaintiff's decedent, ran so, suddenly, upon and over the deceased." Thereby he was instantly killed.

not to separate his mine under the contract.

It is urged by counsel for appellant that it was commonly safe place to work and that the court erred in directing a verdict. It is true that under the law and in the duty of the master, and under the obligations of the relation the plaintiff should not be defeated of any of his right of the deceased. It is, however, true that a mere possibility of some negligence. It has not been [illegible] of. The fact that it was required to install the [illegible] with a reasonably safe place to work [illegible]

operator of the mine of the right in a reasonable manner and by reasonable means to prosecute the work in which it was engaged.

It appeared from the evidence of all of the witnesses that the mine at the time of the injury was being operated in the usual and customary way; that the machinery was in good repair, the road bed in a safe condition and that the car at this time was being hauled by this car puller in the usual way, and that the deceased was engaged in his usual employment and in the usual manner. If this be true then what was the appellee's negligence? It is said by counsel that it is the duty of appellee to give the deceased notice or warning of this car being moved but it is not shown by the record that such notice or warning ever had been given in moving a car or that the car was moved at an unusual rate of speed or at an unusual time, or that any necessity existed for giving warning in this particular case, and if this be true we are unable to see upon what principle a duty devolved upon the appellee to give the deceased notice or warning that it was moving the car. The deceased had been at work there at this same business for about one year, knew all about the movements of the cars, knew that they were moved without notice or warning, and he was presumed to know the manner of conducting the work at that mine and it is not shown by any evidence that it was an unsafe or unreasonable manner. It is true, as contended by counsel for appellant, that if there was any evidence with its reasonable intendments fairly tending to prove the case for the plain-

operator of the mine of the right in a reasonable way or and by reasonable means to prosecute the work in which it was engaged.

It appears from the evidence of all the witnesses that the mine at the time of the injury was being operated in the usual and customary way. That the machinery was in good repair, the rope had in a good condition and that the car at this time was being hauled by this car driver in the usual way, and that the deceased was engaged in the usual employment and in the usual manner. In this it seems then that was the operator's negligence. It is said by counsel that it is the duty of operator to give the deceased notice or warning of this car being moved but it is undisputed by the proof that some [illegible] were [illegible] in moving a car or that the car was moved at an unusual rate of speed or at an unusual time, or that any precaution [illegible] for giving warning in this particular case, and if this be the case we are unable to see upon what ground a duty devolved upon the operator to give the deceased notice or warning that it was moving the car. The deceased had been at work there at this same business for about one year, knew all about the movements of the cars, knew that they were moved without notice or warning and he was [illegible] the manner of conducting the work [illegible] not shown by any evidence that it was in unusual or unreasonable manner. It is true, as contended by counsel for appellant, that if there was any negligence [illegible] intendments fairly tending to prove the [illegible]

tiff that then it became the duty of the judge to submit the case to the consideration of the jury, but we are of the opinion that under the evidence in this case no duty is shown to exist whereby the appellee was required to give notice or warning that it was about to move, or in the act of moving, the car in question, or that it was moved in a negligent manner. Counsel have cited for our consideration authorities holding that a duty devolves upon a railroad company to give warnings by sounding the bell or blowing the whistle. That, however, is controlled by statute and there is no statute requiring notice to be given under the circumstances shown to exist in this case.

We believe that the court was justified in directing a verdict for the defendant, and the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

Not to be reported in full.

[illegible]

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 24th *day of April A. D. 1916.*

Clerk of the Appellate Court.

OPINION

s

Rehearing denied 5/8/16

199 A 258

1622

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the Seventeenth *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

199 I.A. 258

Etta Jane Johnson,
Appellee.

vs.

No. 71.

October Term, 1915

Chas. E. Hull and Harry Redfearn,
Appellants.

ERROR TO
APPEAL FROM

Circuit COURT

Marion COUNTY

TRIAL JUDGE

HON. THOMAS M. JETT.

Term No. 71. In the Appellate Court, Agenda No.29.

Fourth District.

October Term A. D. 1915.

Etta Jane Johnson, Appellee	
vs.	Appeal from the Circuit Court of Marion County, Illinois.
Charles E. Hull and Harry Redfearn, Appellants.	

Ichride, J.

Appellee recovered a judgment for $800.00 against Charles E. Hull and Harry Redfearn, in the Circuit Court of Marion County. The cause of action arises out of a collision between an automobile, alleged in the declaration to be the property of the defendant Hull, operated at the time of the collision by his servant Redfearn, with a buggy in which appellee was riding. The accident occurred on West Main Street in the City of Salem. As a result of the collision, the buggy was overturned, and appellee thrown upon the pavement, and claims to have sustained divers personal injuries in consequence thereof.

Charles E. Hull alone prosecutes this appeal. No claim is made that the evidence did not fairly establish negligence in the operation of the automobile, and that such negligence was the direct cause of the injury; nor is it claimed that the damages awarded are excessive.

Counsel for appellant earnestly insists that this judgment should be reversed for this reason: it is urged that before appellee was entitled to recover she was required to

establish by a preponderance of the evidence that at the time of the accident in question the relation of master and servant existed between appellant and the defendant Ledfearn, and that Ledfearn was then acting engaged in the business of the master, within the scope and terms of his employment, and it is claimed that appellee failed to make such proof. Appellant contends that the evidence clearly shows that at the time this unfortunate occurrence happened he was not acting as the servant of appellant; that he was engaged in a private enterprise of his own; that he was using appellant's automobile without his knowledge or consent, and hence there was a failure to establish liability as to appellant, and that the Court erred in not directing a verdict as to him. The major portion of appellant's argument is directed to a discussion of the evidence upon these questions, and the law applicable thereto. In the view we take of this case, these matters, which appellant contends were questions of fact, which appellee was called upon to establish by a preponderance of the evidence, were all admitted by the pleadings in the case.

Each count of the declaration charged that on the date of the injury, ~~appellant~~ defendant Hull was the owner of and conducting a garage, in the City of Salem; that he owned divers automobiles which he let for hire and reward; that he had in his employ the defendant Harry Ledfearn as a driver of said automobiles, and on the date in question he let for hire one certain automobile, and furnished as a driver thereof the defendant Ledfearn. These recitals in

establish by a preponderance of the evidence [illegible]
time of the accident in question [illegible]
and servant existed between [illegible]
defendant, and that [illegible]
the business of the master, within the scope [illegible]
his employment, and it is clear [illegible]
make such proof. Appellant insists that [illegible]
[illegible]
was not acting in the course of employment; [illegible]
engaged in a mission [illegible] of his own; that [illegible]
using superintendent's automobile without the knowledge or con-
sent, and hence there was a failure to establish liability
as to appellant, and that the court erred in not [illegible]
a verdict as to him. The main portion of [illegible]
ment is directed to a discussion of the evidence [illegible]
questions, and [illegible] liability [illegible].
[illegible] of this case, [illegible], which [illegible]
were questions of fact, which [illegible]
establish by a preponderance of the evidence, [illegible]
[illegible] by the jury in the case.

[illegible] each count of the declaration [illegible]
date of the injury, appellant had [illegible]
conducting a garage, in the City of [illegible]
driven automobiles which he let for hire; [illegible]
he was in his employ the defendant [illegible]
driver of said automobile, and on the [illegible]
he let for hire one certain automobile, [illegible]
[illegible]

the beginning of each count were matters of inducement only. The only plea filed was the general issue. We are of the opinion that if appellant desired to put in issue the question as to whether or not at the time charged, the relation of master and servant existed between himself and Redfearn,-or whether or not, at that time, Redfearn was acting for appellant, within the scope of his employment and authority,- or was engaged upon some private enterprise of his own, entirely independent of his connection with, and employment by appellant, he was required to file a special plea for that purpose.

In Carlson vs Johnson, 263 Ill.,556, it is said: "We regard the rule as well established in this State, that matters of inducement in a declaration are not traversed by a plea of the general issue. The occupation, ownership or operation of the property or instrumentalities which are set out as connected with or as the cause of the injury, the character in which the parties appear in the litigation are not denied by the general issue." By pleading the general issue a railroad company impliedly concedes that at the time of the alleged injury, it was operating the particular line of railroad mentioned in the declaration, and that the persons in charge of the train were its servants. (Pennsylvania Co. vs. Chapman, 220 Ill.,428; McMulte vs. Lockbridge, 137 Ill.,270; Chicago Union Traction Co. vs. Jerka, 227 Ill.,95) In an action for injuries resulting from being struck by defendant's automobile, where the only plea filed

is the general issue, under such plea the defendant admits the ownership of the automobile, and that the operator in charge of it was his servant. (Muehler vs. Stafford, 185 Ill., App., 199; Rasmussen vs. Drake, Id. 526.) Under these authorities we are of the opinion that the trial court properly denied the motion to direct a verdict.

But independently of the admissions implied by the pleadings, we think the trial court decided correctly in refusing to direct a verdict. There was evidence tending to show that ~~appellant~~ defendant Hull was operating a garage in the City of Salem; that he kept and used automobiles therein for livery purposes; that Redfearn was a licensed chauffer; that he was in the employ of ~~appellant~~ defendant Hull, worked about the garage,- also as a driver of cars used for livery purposes; that as a part of the terms of his employment, Redfearn had a right to have and use an automobile of ~~appellant's~~ defendant, two evenings of each week; that the automobile in the collision belonged to ~~appellant~~ defendant Hull, and was driven by Redfearn; that at the time of the accident, Redfearn was using the car for livery purposes, carrying passengers for hire, and received pay for such services; that in the collision the car was damaged and Redfearn [illegible] another car belonging to ~~appellant~~ defendant Hull, and took ~~[illegible]~~ plaintiff to her home in the country; that after this collision, the owner of the buggy brought suit for damages against ~~appellant~~ defendant Hull and Redfearn before a justice, recovered a judgment, and that judgment was paid by ~~appellant~~ defendant Hull; that when spoken to about this accident, and in reference to a settlement with

plaintiff defendant Hull

[illegible], ~~appellant~~ stated in substance that he would go to see Dick, (meaning Redfearn), and find out how it occurred, and if it was his (Redfearn's) fault, they had better settle the matter.] Proof of such circumstances together with all reasonable inferences to be drawn therefrom at least tended to show that Redfearn was a servant of appellant's, and at the time of the accident was acting within the apparent scope of the appellant's business, and within the apparent scope at least of his (Redfearn's) duties and employment. Such evidence, together with that introduced by defendants in contradiction and denial thereof, even under proper special pleas, denying that Redfearn at the time of the accident was appellant's servant, or denying that he was then engaged in the master's business, or acting within the real or apparent scope of his duties and employment, would present but an issue of fact for the jury,-not a question of law for the Court. (Swancutt vs Trout Auto Livery Co. 176 Ill.App.,606; Krzikowski vs. Sperring 187 Ill.,Ap.488)

Complaint is made of the third instruction given for appellee. We have examined that instruction, and do not find it subject to the objections urged against it. The objections urged relate principally to matters which are not in issue under the pleadings, as we have heretofore indicated. The instruction was not accurate, in that it required matters admitted to be established by proof, but in this respect it was more favorable to appellant, than to appellee, and he has no cause of complaint. Appellant's

refused instruction No. 5 was properly refused for two reasons: First, there was no issue as to the matters sought to be submitted by it; and second, because the substance of the instruction is fully covered by appellant's given instructions 7, 8 and 9. The substance of appellant's refused instruction No. 2, is contained in his given instruction No. 4.

We regard the court's rulings upon the admission and exclusion of evidence as substantially correct. The remarks of counsel in arguing the case to the jury, of which complaint is made were not of such character as to require a reversal of this judgment. Upon objection, counsel withdrew the statement. The Court sustained appellant's objection, and directed the jury to disregard the remarks. We are unable to see how the statements complained of could have prejudiced appellant's rights before the jury.

Believing this record to be free of substantial error, we affirm the judgment of the trial court.

Affirmed.

Not to be reported in full.

reduced instruction No. 8 was properly refused [illegible]
[illegible], [illegible] to be [illegible] to be committed by it; and second, [illegible]
[illegible]
instructions 7, 8 and 9. The [illegible]
reduced instruction No. 8, is contained in [illegible]
[illegible].

[illegible]
and exclusion of evidence on substantially [illegible].
remarks of counsel in arguing the case to [illegible],
which complaint is made were not of such character as to
[illegible]
counsel withdrew the statement. The Court sustained [illegible]
pellant's objection, and directed the jury to disregard the
remarks. [illegible] to see how the statement [illegible]
or could have prejudiced appellant's rights [illegible]
[illegible] giving this record to be free of [illegible]
error, we affirm the judgment of the trial court.

Affirmed.

[illegible]

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 25th *day of April A. D. 1916.*

Clerk of the Appellate Court.

PINION

199 A 261

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk, *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the Seventeenth *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

199 I.A. 261

George Hippard, Elizabeth A. Hippard and Adam Karr,
Appellants.

vs.

No. 73.

October Term, 1915

George C. Rebhan, Admr.D.B.N.W.W.A. of the Estate of Phillip John Gundlach, Deceased,
Appellee.

~~ERROR TO~~
APPEAL FROM

Circuit COURT

St. Clair COUNTY

TRIAL JUDGE

HON. GEORGE A. CROW.

Term No. 73. In the Appellate Court, Agenda No.17.

Fourth District.

October Term, 1915.

George Lippard, Elizabeth A. Lippard and Adam Barr, Appellants.	
vs.	Appeal from Circuit Court of St.Clair County, Illinois.
George C. Kelhan, Admr., [illegible] of the estate of Phillip John Gundlach, deceased. Appellee.	

[illegible]

It is sought by this appeal to reverse a decree of foreclosure and sale entered by the Circuit Court of St.Clair County.

~~[illegible]~~

On April 24, 1902 the ~~appellants~~ defendants executed to Phillip John Gundlach two notes each for the amount of $2500.00, one one year after date and bearing interest at the rate of five and one-half per cent per annum, payable semi-annually, and to secure the payment of said notes executed the mortgage in question. It appears that on October 24, 1902, April 24, 1903, October 24, 1903, April 24, 1904, October 24, 1904, April 25, 1905, January 24, 1906, April 24, 1906, October 24, 1906, April 25, 1907, October 24, 1907, April 24, 1908 and October 24, 1908, the amount of $68.25 was paid at each of said times

[illegible] No. 75. In the appellate Court, [illegible]

Fourth District.

October Term, 1918.

[illegible] Appellee, Plaintiff in error,
[illegible] and Adam Barr,
Defendants.

[illegible]

[illegible] J. Kohlsaat, Judge.

[illegible] A. of the State of
[illegible] Appellees.

Appeal from Circuit Court
of St. Clair County, Illinois.

[illegible]

[illegible] to reverse a decree of
[illegible] by the Circuit Court of St. Clair,
[illegible]

[illegible] such for the amount of [illegible], [illegible]
[illegible] date and bearing interest at the rate of [illegible] and
[illegible] certain, payable semi-annually, and to secure
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]

upon each of said notes, and endorsed thereon as interest paid. It also appears that Phillip John Gundlach kept a book in which he entered his notes and these payments appear upon said book as having been made at the time endorsed upon the notes. A further payment was made on May 2o, 1909 but this was entered by Sophia Gundlach, at the direction of Phillip John Gundlach. Phillip John Gundlach died July 1st, 1909, leaving a last will and testament and appointing his sons Jacob, Jr., and Phillip as executors, both of whom died during the year 1911, and on January 3, 1914, letters testamentary were issued to George C. Nebhan, and this suit of foreclosure was commenced on March 31, 1914.

It appears ~~from the evidence~~ that the lands described in said mortgage were in two seperate tracts, one of which belonged to Elizabeth A. Nippard and one to George Nippard, and that said lands were sold and transferred by the said Nippards to Adam Harr. It further appears ~~from the evidence~~ that at the several times of payment of interest above mentioned being made ~~[illegible]~~ Phillip John Gundlach made a certificate of deposit and placed the amount each time to his credit in the Belleville savings bank, and upon the same, or the next day, the checks so placed to his credit were cleared at the Belleville Bank and Trust Company, and charged to the account of George Nippard, the Nippard Grocery Company or the Vulcan Coal and Mining Company, and that the checks were afterwards surrendered by this bank to

Then go to 4.

to the parties drawing them. Notice was given the defendants to produce these checks upon evidence but they failed to do so. The Hippard Grocery Company was owned by George Hippard and his wife Elizabeth A. Hippard, and George Hippard was President and Elizabeth A. Hippard, Secretary of the Vulcan Coal and Mining Company from 1905 to 1908.

The answer of the defendants denies that these payments were made by them or by their authority, and also plead the statute of limitations. The Circuit Court found that the payments of interest were made by George Hippard or by his authority, and that by such payments of interest the bar of the statute of limitations did not attach as to the said George Hippard, and the decree of foreclosure and sale was granted but it was held that no personal liability existed as to Elizabeth A. Hippard.

Counsel for appellants ask for a reversal of this decree for two reasons. 1st.-That the debt upon which the mortgage was based was barred by the statute of limitations. 2nd.- That the decree is erroneous in the appointment of a receiver.

It is true that more than ten years elapsed between the maturing of said notes and the commencement of this suit, and the action would be barred by the statute of limitations, unless a payment of interest was made by the authority of the appellants, Hippards, or one or the other of them. Where a payment has been made upon a note by the maker thereof, or by his authority, the statute would not run against the mortgage securing the note until the lapse of ten years after such payment. Kraft vs. Holzmann, 204 Ill.,548; Schifferstein vs. Allison, 193 Ill.,662. So

to the parties drawing them. Notice was given the [illegible] failed to do so. The Edward Tracey [illegible] by George Lippard and Sir Wilde Lippard [illegible], and [illegible] secretary of the Welsh Coal and Iron [illegible] [illegible].

The answer of the defendants [illegible] these mortgages were made by them or by their [illegible], and also plead the statute of limitations. The Circuit Court found that the signature of Lippard were made by [illegible] or by his authority, and that by such signature [illegible] the bar of the statute of limitations did not [illegible] to the said George Lippard, and the course of [illegible] and sale was granted but it was held that [illegible] liability existed as to Elizabeth C. Lippard.

[illegible] for [illegible] of this decree for two reasons. 1st.- That the debt upon which [illegible] was barred by the statute of limitations. 2nd.- That the decree is erroneous [illegible] [illegible].

It is true that more than six years [illegible] between the maturing of said notes and the [illegible] suit, and the action would [illegible] limitations, [illegible] [illegible] [illegible] [illegible]. There cannot be [illegible] under tacital, or by [illegible] identity, [illegible] could not run against the mortgage according [illegible] [illegible] years after maturity. Ingell vs. Ritenour, 206 Ill. 188; Trafflerstein vs. Allison, 147 Ill. 162. [illegible]

that any payment made in this matter within ten years prior to March 31, 1914, would remove the bar of the statute of limitations. The real question in this case is, were any of these payments made by George Hippard, or by his authority, within ten years prior to the commencement of this suit? Any payment made as aforesaid after March 31, 1904, would remove the bar of the statute of limitations. The Circuit Court held that the several payments of interest as endorsed upon the notes were made by George Hippard, or under his authority. We agree with the contention of counsel that the law is that that the mere endorsement upon the notes by Phillip John Gundlach would not of itself be sufficient to remove the bar but that it required an affirmative act or authorization by Hippard to remove the bar of the statute of limitations, and the question is, was the court correct in holding that the payments so made were by his authority. The evidence in this case shows that during a portion of this time George and Elizabeth Hippard were operating a grocery store inthe name of the Hippard Grocery Company, and also a coal mine in the name of the Vulcan Coal & Mining Company; and it further appears that as these payments were made to Phillip John Gundlach he made a deposit thereof with the Belleville Savings Bank and was given credit therefor upon its accounts, and that on the same day, or the next, the Belleville Savings Bank cleared these checks through the Belleville Bank & Trust Company, and the amount was charged to the account of George Hippard, the Hippard

~~Grocery Company or the Vulcan Coal & Mining Company, and~~ In many cases the exact amount was charged to the account of one or the other of these parties; and in other cases where the checks that were cleared by the Belleville Bank & Trust Company were more than three in number they were lumped together and appear charged in a large sum. ~~It does appear specifically that~~ On January 27, 1906, the account of Phillip John Gundlach was credited in the Belleville Savings Bank with $137.50, and on the same day George Hippard was charged with $137.50 upon his account with the Belleville Bank and Savings Company, and ~~that~~ on May 5, 1906 a like sum was credited to the account of Phillip John Gundlach and charged to the account of George Hippard, and the checks with which George Hippard was charged were surrendered to him by the Belleville Bank & Trust Company. The date and amount of these checks correspond with the date and amount endorsed upon the notes as interest paid. Notice was given him to produce these checks together with the other checks but he failed to do so, and the proof was made by the cashier of the Belleville Bank & Trust Company. The failure upon the part of the defendants to produce the checks, or show some reason why they were not produced, is a circumstance tending to show that the furnishing of such checks would warrant the court in presuming that if produced they would be unfavorable to defendants. Hartford Life Insurance Co., vs. Sherman, 103 App., 202; Hector vs. Hector, 8 Ill., 105.

It is urged by counsel that the only evidential value

of book accounts would be to show that moneys were received upon certain dates but it would still have to be shown that the payments were made by defendants, or by their authority, and it is urged that as the book account showed that some of the payments were made through "Son Jake" that the book account tended to disprove the fact that they were paid by the defendants. We think that all that this amounts to is that Jake was made a medium of conveyance of the checks but we agree with the Circuit Court that the payments as shown to have been made by the checks and deposits in the bank for the proper amounts and upon the proper dates for the payment of interest, that the court was fully warranted in finding that these payments were made by defendants and for the purpose of paying the interest due upon the said notes, and this being true the statute of limitations could not have the effect to bar complainant's right of action.

It is said that as one tract of land belonged to Elizabeth Hippard and the other to George Hippard, that any payments of interest by George Hippard would not prevent the statute from running as against Elizabeth Hippard. These were joint notes, executed by the defendants and while it is true that a personal payment by one joint debtor, without the knowledge or consent of the other, will not operate to bind the latter so as to authorize a new promise but "A mortgage given to secure the payment of a joint and several note will operate to continue a lien on the mortgaged premises so long as payments of the note may be enforced against either joint debtor and until the debt is extinguished." Kitzmuller vs. Neuer, 130 App.,380; Holmes vs. Bartlett et al, 160 App.,443. No personal decree was taken against

upon certain dates but it would still have to be shown that the payments were made by defendants, or by their authority, and it is urged that on the book account showing that some of the payments were made through "Don John" they, the self account tended to disprove the fact that they were made by the defendants. We think that all that this evidence tends to be that John was made a medium of conveyance of the checks but we agree with the trial court that the evidence as shown to have been made by the checks and deposits in the bank for the proper amounts and upon the proper dates for the payment of interest, that the court was fully warranted in finding that these payments were made by defendants and for the purpose of paying the interest due upon the said notes, and this being true the absence of limitations could not have the effect to bar complainant's right of action.

It is said that no one trust of land belonged to Elizabeth Ellwood and the other to George Ellwood, that any payments of interest by George Ellwood would not prevent the statute from running as against Elizabeth Ellwood. These were joint notes, secured by the deed-of-trust and while it is true that a personal payment by one joint maker, without the knowledge or consent of the other, will not suffice to bind the latter so as to authorize a recovery, but the opportunity given to secure the payment of a joint and several note will operate to continue a lien on the corporeal property so long as payments of the note may be enforced against either joint debtor and until the debt is extinguished. Hillmuller vs. Ewer, 130 Ind., 380; Eshes vs. Smith et al, 150 Ind., 442. In personal decree was taken against

Elizabeth Hippard in this case and we are of the opinion that payments by George Hippard continued the lien of the mortgage in force.

It is next insisted that the court erred in the appointment of a receiver but no particular reason is shown by such error exists; no attempt made to point out any such error, except to state that there is no order of court authorizing the appointment and that the bill is not sworn to. The decree itself constitutes an order making this appointment and the presumption is that the court heard evidence upon which to base such an appointment, in as much as the bill asks that a receiver be appointed, and as no particular reason is pointed out and shown to exist why the court erred in the appointment of a receiver, we are not inclined to disturb the order making such appointment.

It was a question of fact to be determined by the court as to whether or not the payments of interest were made by George Hippard or his authority, and there being evidence in the record which clearly tends to show that the payments were made by George Hippard we are not able to say that the finding of the court was manifestly against the weight of the evidence, and if it is not so then we have no right to disturb the decree of the court.

We are unable to say that the court erred in the rendition of the decree herein, and the decree of the Circuit Court is affirmed.

AFFIRMED.

Not to be reported in full.

Lindsey Lippard in this case and we are of the opinion that payments by George Lippard continued the lien of the mortgage in force.

It is most insisted that the court erred in the appointment of a receiver but no particular reason is shown by such error exists; no attempt made to point out any such error, except to state that there is no order of court authorizing the appointment and that the bill is not sworn to. The decree itself constitutes an order making this appointment and the presumption is that the court heard evidence upon motion to base such an appointment. In as much as the bill asks that a receiver be appointed, and as no exceptions were pointed out and shown to exist why the court erred in the appointment of a receiver, we are not inclined to disturb the order making such appointment.

It was a question of fact to be determined by the court as to whether or not the payments of interest were made by George Lippard or his authority, and there being evidence in the record which clearly tends to show that the payments were made by George Lippard we are not able to say that the finding of the court was manifestly against the weight of the evidence, and if it is not so then we have no right to disturb the decree of the court.

We are unable to say that the court erred in the rendition of the decree herein, and the decree of the [illegible] is affirmed.

[illegible]

[illegible] to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 25th *day of April A. D. 1916.*

Clerk of the Appellate Court.

NOINI

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the ------4th------ *day of* ~~*April*~~ May, *A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Robert L. Thomas and Lease Ruddick,

Appellants.

vs.

No. 26.

March Term, 1916.

Sherman Dodge, Mabel E. Fox et al,

Appellees.

ERROR TO

APPEAL FROM

Circuit COURT

Marion COUNTY

TRIAL JUDGE

HON. THOS. L. JETT.

Term No. 26. In the Appellate Court Agenda No. 15

of Illinois.

March Term, A. D. 1916.

Robert L. Thomas and Lease Ruddick, Appellants. vs. Sherman Dodge, Mabel M. Fox, et al, Appellees.	Appeal from the Circuit Court of Marion County.

Opinion by Boggs, J.

This is an appeal from a decree rendered by the Circuit Court of Marion County, Illinois. The appeal was originally taken to the Supreme Court on the theory that a free hold interest in real estate was involved, but that Court at its February Term 1916, held that no free hold was involved and certified the same to this Court. Dodge et al v. Thomas et al 272 Ill. 80.

An examination of the opinion rendered by said Court in certifying said cause, however, discloses that the Court passed on the real question involved, and that was, whether the Circuit Court under the mandate of the Supreme Court rendered in this cause on a former appeal to said Court had authority to proceed with the matters involved in the cross bill filed by appellants in said cause.

The record discloses that a decree had been rendered by the Circuit Court of Marion County in the above

Term c. 26. In the Appellate Court
of Illinois.

Appellants.

Appeal from the Circuit
Court of Marion County.

Opinion by Lorenz, J.

This is an appeal from a decree rendered by the Circuit Court of Marion County, Illinois. The appeal was originally taken to the Supreme Court on the theory that a free hold interest in real estate was involved, but that court at its February Term 1919, held that no free hold was involved and certified the case to this court. Lodge vs Ed v. Thomas et al 291 Ill. 401.

On examination of the record presented by the parties in error, it appears, however, therefore that the Court based on the well qualified testimony, and therefore, neither the Circuit Court nor the Supreme Court of the Supreme Court rendered in this cause on a former appeal in said Court had authority to proceed with the matters involved in the cross bill filed by appellants in said cause.

The cause dismissed and decree had been rendered by the Circuit Court of Marion County in the above

entitled cause, and that said decree was appealed from to the Supreme Court, and on the hearing the decree of the Circuit Court was reversed and remanded with direction to the Circuit Court to dismiss the bill filed in said cause as to the property known as the hotel property for want of equity. Dodge v. Thomas, 268 Ill.78. ~~[illegible]~~, ~~was said with reference to the status of said cross-bill which had been dismissed by the Circuit Court on the hearing before it, the relief having been granted on the original bill.~~ When the cause was reinstated in the Circuit Court the Chancellor was of the opinion that in as much as the Supreme Court had made no mention of the order dismissing the cross bill, that all that he had authority to do was to dismiss the original bill as to the property known as the hotel property, and that he had no authority to proceed with said cause under the cross bill.

The Supreme Court in considering the effect of its judgment on the cross bill at page 81 of Vol. 272, says: "In support of the jurisdiction of this court to entertain the appeal appellants argue that the original decree of the Circuit Court was an adjudication that cross-complainants had no interest in the property and were entitled to no relief under the cross-bill, and that the dismissal of the original bill after remandment of the case, without any order or proceeding under the cross-bill, leaves the rights of the cross complainants as adjudicated by the original decree, and said decree could be pleaded as res judicata in any other proceeding brought by Thomas and Reddick. We think this is a misapprehension. The entire decree of the Circuit Court was reversed by the judgment of this court.

entitled cause, and the main decree was [illegible]
to the Supreme Court, and on the hearing the [illegible]
the Circuit Court was reversed and remanded [illegible]
to the Circuit Court to dismiss the bill [illegible]
cause as to the property in the hotel [illegible]
property. Lodge v. Thomas, 208 U.S. [illegible]
[illegible]
[illegible] bill. When the cause was returned to the Circuit
Court the defendants moved to dismiss, [illegible]
the Supreme Court had made no mention of the order dis-
missing the cross bill, that all that he had authority to
do was to dismiss the original bill as to the property
known as the Hotel property, and that he had no authority
to [illegible]

The Supreme Court in considering the effect of the
judgment on the cross bill at page 83 of id. [illegible]
support of the jurisdiction of this court to [illegible]
appellants argue that the original decree [illegible]
Circuit Court was an adjudication that [illegible]
had no interest in the property and was entitled to
relief under the cross-bill, and that the [illegible]
order or proceeding under the cross-bill. [illegible]
of the other defendants [illegible]
decree, but a decree could [illegible]
any other proceeding brought by [illegible]
bill, this is a misconception. The [illegible]
Circuit Court was reversed by the [illegible]

The reversal was not merely of that part of the decree finding the original complainant was the equitable owner of and entitled to the property, but also of that part of the decree dismissing the cross-bill for want of equity. The whole decree affecting this property was reversed and every adjudication made in and by it was set aside, annulled and thereafter stood for naught, and it could not afterwards be pleaded in bar as an adjudication against any of the parties to it."

We think this language of the Supreme Court practically settles the question involved on this appeal, and that under said holding this case should be reversed and remanded with direction to the trial court to allow the amendment to the cross bill and to proceed with said cause as though said cross bill had never been dismissed.

Said cause is therefore reversed and remanded with directions to the trial court to allow said cross bill to be amended and said parties to proceed under the same according to their respective rights therein.

Reversed and remanded with directions

[illegible]

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 4th *day of* April *A. D. 1916.*

Clerk of the Appellate Court.

OPINION

1627

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the -----25th----- *day of* ~~April~~ May, *A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

199 I.A. 282

Illinois Central Railroad Company,
Appellant.

vs.

No. 19.

October Term, 1915

N. S. McDaniel,
Appellee.

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Jasper COUNTY

TRIAL JUDGE

HON. JAMES C. McBRIDE.

Term No. 19. In the Appellate Court Agenda No.[illegible]

of Illinois, Fourth District.

October Term, A. D. 1915.

Illinois Central Railroad Co., Appellant.	
vs.	Appeal from Circuit Court
. E. McDaniel,	of Jasper County.
Appellee.	

Opinion by Boggs, J.

An action of forcible entry and detainer was brought before a Justice of the Peace of Rose Hill, Jasper County, by appellant against appellee to recover possession of a plot of ground 12 x 24 feet on which a coal shed was located. Appellee did not appear before said Justice and judgment was entered by default and on appeal was taken by appellee to the Circuit Court where a trial was had, resulting in a verdict and judgment in favor of appellee, from which judgment this appeal is prosecuted.

The grounds relied on by appellant for a reversal of this case are, that the verdict is against the manifest weight of the evidence; that the court erred in its rulings on the evidence; and that the court erred in instructing the jury.

It is contended by appellant that its way-lands in Rose Hill on the west side of the track which runs north

Case 6. In. In the Municipal Court
of Illinois, Lowden District.
October Term, A. D. 1900.

[illegible]

[illegible]

vs.

[illegible]

[illegible] of Jasper County.

[illegible]

Opinion by Pierce, J.

In action of forcible entry and detainer commenced and brought before a Justice of the Peace of Jasper County, by appellant against appellee to recover possession of a plot of ground in the town of [illegible] which was located, appellee did not appear before said Justice and judgment was entered by default for [illegible] the taken by appellee to the Circuit Court where a trial was had, resulting in a verdict and judgment in favor of appellee, from which judgment this appeal is prosecuted.

The grounds relied on by appellant for a reversal of this case are, that the verdict is against the weight of the evidence; that the court erred in its rulings on the evidence; and that the court erred in [illegible] the jury.

It is contended by appellant that [illegible] in June 1899 on the west side of the [illegible]

and south, consisted of a strip of land ninety feet wide and 1060 feet long, beginning at the northeast corner of the northwest quarter of the southeast quarter of section 7, township 8 north, range 18 east, and extending south. The coal shed in question ~~is~~ was 758.5 feet south of the north end of said strip of land and 33½ feet west of the center of its track.

The north 758.5 feet of said premises claimed by ~~appellant~~ plaintiff as its way lands on the west of said track ~~is~~ was located in the Village of Rose Hill. The remainder of said strip lay south of the original Town of Rose Hill. ~~—~~ ~~Neither~~ Defendant did not question the claim of ~~appellant~~ plaintiff to that part of said strip that lay in said Village of Rose Hill, but ~~contends~~ claimed that the way-lands of said ~~appellant~~ plaintiff south of said Original Town of Rose Hill are only 33-1/3 feet in width, and that the coal shed in question ~~is~~ was not on the right of way of ~~appellant~~ plaintiff. ~~This is really the controlling point in this case.~~ That part of the strip claimed by ~~appellant~~ plaintiff as its way land which lay south of Rose Hill was not inclosed by a fence, but ~~appellant~~ plaintiff contended that it, and those through whom it claims, have been in possession of said premises for more than twenty-five years. ~~The~~

The evidence of ~~appellant~~ plaintiff tended to show that it used said strip of land for piling ties, rails and other material; that its patrons used the same in going to and from its tracks in loading and unloading freight; that it mowed said strip of ground and further that it placed property line posts to indicate the west line of said

~~Evidence [illegible]~~

~~Plaintiff [illegible] strip~~

and south, consisting of a strip in [illegible]
[illegible] feet long, beginning at the [illegible]
northwest quarter of the southwest quarter [illegible]
township - north, range 1 west, and extending [illegible]
coal dug in question is Vin.3 feet [illegible]
and of said width of land and 300 feet [illegible]
of the track.

The month Vin.3 feet of said [illegible]
[illegible] on the way lands on the [illegible] of said [illegible]
located in the village of [illegible]. The [illegible]
[illegible] of the railroad [illegible]
[illegible] does not question the claim of [illegible]
part of said strip that [illegible] in real [illegible]
but [illegible] that the way-lands of said [illegible]
said original [illegible] of [illegible] only [illegible]
width, and that the coal dug in question [illegible]
right of way of [illegible].

[illegible] case. The part of the strip [illegible]
[illegible] on the way land which [illegible]
was not included by [illegible], but [illegible]
it, and since [illegible] when [illegible]
of said [illegible] from [illegible]

The evidence of [illegible] track
used said strip of land for [illegible], [illegible]
material; that its [illegible] used the [illegible]
[illegible] and [illegible] it
[illegible] [illegible]

strip of land so claimed by it.

It was further contended by plaintiff that the Grayville & Mattoon R. R. Co., through them plaintiff claimed by mesne conveyances went into possession of said strip of land under a Quit Claim deed from one Henry C. Wilson, dated June 20, 1878, given for the purpose of releasing said premises and other lands from the lien of a certain Trust Deed. Said Quit Claim deed was never recorded but was admitted by the Court for the purpose of showing the extent of appellant's possession.

On the other hand defendants contended that the acts and uses which plaintiff relied on to establish possession of said strip of land related to that part of said strip lying north of the south line of said original Town, which would also be north of the plot of ground on which said shed is located.

Defendant testified that he has known that part of this strip of ground claimed by plaintiff lying south of the Original Town of Rose Hill for twenty-five years, and that no use whatever was made by plaintiff of said strip, with the exception of the east 33-1/3 feet thereof, ~~that is to say, appellee contends that south of said original Town the gap-lands of appellant are only 33-1/3 feet wide, measuring from the center of its main track.~~ Defendant testified, and was corroborated by a large number of witnesses who testified that so much of this strip of ground as lay south of the original Town of Rose Hill, except the 33-1/3 feet thereof

adjacent to the main track of appellant had been vacant and unoccupied so far as appellant's rail road was concerned; that the public had been driving over this strip of ground for the purpose of reaching a mill located south of the village and that the highway commissioners had graded this roadway. Objection was made by appellant to the testimony offered with reference to the use made by the public of said strip of ground as a public highway. The court admitted the evidence but stated that it was admitted, not for the purpose of showing a public highway, but for the purpose of showing the use or occupation that was made of said premises, and for the purpose of showing who, if any one, was in the control of the same.

Relative prior to the institution of the proceedings before said Justice of the Peace, appellee's coal shed was located somewhat east and north of its present location, and as then located was partly on said strip of 33-1/3 feet adjoining the main track of appellant's right of way, and which appellee contended was a part of appellant's land. Appellant it seems insisted on appellee paying rent on said ground, the amount demanded being $10.00. Appellee testified that he stated to the agent of appellant that a part only of said shed was on its right of way, and that he was therefore willing to pay but $5.00. Appellant accepted the $5.00 in settlement therefor. Thereafter appellee moved his said shed west and south so that no part of it was on said strip of 33-1/3 feet immediately

adjoining the main track of said railroad on the west and south of said original Town of Rose Hill. ~~In other words, appellee removed his said shed to a strip which he contends is outside of appellant's waylands.~~ ~~Appellee~~ further insists that ~~appellee~~ defendant having recognized the relation of land lord and tenant could not dispute the same. Appellee's answer thereto is that when he removed said shed from what he contends is appellant's right of way, he was no longer appellant's tenant.

The evidence on this controverted question as to whether or not appellant was in possession of the strip of ground on which appellee removed his shed was sharply conflicting, ~~and raised a question of fact to be determined~~ by the jury, and we are unable to say the finding of the jury is against the manifest weight of the evidence. In fact, we are of the opinion that the jury were warranted in finding that appellant was not in possession of the plot of ground on which appellee removed his shed at the time the same was so removed thereto.

It is next contended by appellant that the court erred in admitting certain deeds offered in evidence by appellee which deeds vested color of title to said premises in appellee. We have examined the record in regard to the admission of these deeds and do not believe that the court erred in admitting the same. Section 7, Chapter 57, of Jurdo's Revised Statutes provides that the action of forcible entry and detainer will lie when any person holds under tenant or unknown lease or sufferance without right

or title. If these lands were vacant and unoccupied, these deeds would tend to show that appellee had not taken possession thereof without title and would therefore tend to show a defense to this action on that theory.

It is next contended by appellant that the court erred in modifying instruction fourteen given for the plaintiff. The modification consisted in the insertion of the words "or title" in said instruction, making the same read, "If the jury believe from a preponderance of the evidence that the defendant entered wrongfully and without lawful right "or title" and then kept the plaintiff from regaining possession, it is sufficient to sustain this action." Under the provisions of said section 2, of chapter 57, of the Statutes we believe the modification made to this instruction was proper. Palmer v. Frank 169 Ill.90; Fitzgerald v. Quinn. 165 Ill.363.

Appellant next insists that the court erred in refusing instructions number five, twelve and sixteen of the instructions offered by it. Instruction No. five is abstract in form and is argumentative. There was no error in refusing said instruction. Appellant's refused instruction No. twelve we think under the issues in this case should have required the jury before finding the issues for appellant to find, not only that appellant went into possession under an unrecorded deed, but also that it continued in such possession as that was a controverted question in the case, and by reason of its failure so to do we think

there was no error in the court refusing the same. Instruction sixteen is argumentative in form and is otherwise calculated to confuse and mislead the jury, and there was no error in refusing the same.

Lastly, it is insisted that the court erred in giving instruction number twenty-two given on behalf of appellee. This instruction referred to certain deeds of conveyance and referred to possession and payment of taxes under said deeds, and was given in connection with the theory of appellee that at the time he moved said wood on to the premises in question the same were vacant and unoccupied. There was no error in giving said instruction as appellee was entitled to have that theory of the case presented to the jury, as there was evidence in the record tending to support the same.

Finding no reversible error in the record the judgment of the trial court will be affirmed.

Judgment affirmed.

Justice McBride took no part in the hearing or decision of said cause.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 25th *day of* May *A. D. 1916.*

C. C. Johnson,

Clerk of the Appellate Court.

NOINI

30 - 21290

ARTHUR S. MERIGOLD,
Appellee,

vs.

THE TWENTIETH CENTURY
THEATRE & AMUSEMENT
COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

199 I.A. 285

STATEMENT OF THE CASE. On October 23, 1913, Arthur S. Merigold, plaintiff, commenced an action of the first class in the Municipal Court of Chicago against Sol H. Goldberg and The Twentieth Century Theatre & Amusement Company, a corporation (hereinafter referred to as the defendant company), defendants, to recover commissions alleged to be due him as a real estate broker for the sale of premises known as No. 4708 Prairie avenue, Chicago, Illinois. Plaintiff claimed the sum of $2,125, being 2½ per cent of $85,000, the sale price of the premises. The defendants entered a joint appearance, and, by an agent, filed an affidavit of merits in which it was stated in substance (1) that neither of them employed plaintiff to sell the premises or agreed to pay him any sum for making such sale, (2) that they were not jointly liable to plaintiff, and (3) that plaintiff was not the procuring cause of the sale, in that the premises were sold for the defendant company by a broker named Kipper, to whom it paid an agreed commission for said sale. The cause was tried before the court without a jury. After plaintiff's evidence in chief had been heard the cause was dismissed as to the defendant Sol H. Goldberg, but the motion of the defendant company for a finding in its favor was denied. At the conclusion of all the evidence the court found the issues against the defendant company and assessed

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

19914.295

[illegible] A. Kurtzberg,
Appellee,

vs.

[illegible] CENTURY
[illegible] & AMUSEMENT
[illegible], a corporation,
Appellant.

[illegible] — [illegible] 1, 1921, [illegible]
[illegible], plaintiff, commenced an action of the first class
in the Municipal Court of Chicago against Sol H. Goldberg and
[illegible] Theatre & Amusement Company, a corporation
(hereafter referred to as the defendant company), defendants,
to recover commissions alleged to be due him on a real estate
[illegible] for the sale of premises known as No. 4708 Sheridan
[illegible], Chicago, Illinois. Plaintiff claimed the sum of $2,125,
being 2½ per cent of $85,000, the sale price of the premises.
[illegible] defendants obtained a jury [illegible], [illegible], to wit, upon
[illegible] an affidavit of merits in which it was asserted in ab-
stance (1) that neither of them employed plaintiff to sell the
premises or agreed to pay him any sum for making such sale,
(2) that they were not jointly liable to plaintiff, and (3)
that plaintiff was not the procuring cause of the sale, in
[illegible] the premises were sold for the defendant company by a
[illegible], to whom it paid an agreed commission for
[illegible] sale. The cause was tried before the court without a
[illegible]. [illegible] plaintiff's evidence in chief [illegible] the
[illegible] was [illegible] to the defendant's [illegible]. [illegible], but
the motion of the defendant company for a finding in its favor
was denied. At the conclusion of all the evidence the court
found the issues against the defendant company and assessed

plaintiff's damages at $2,125, upon which finding judgment for $2,125 against the defendant company was entered.

The defendant company is an Illinois corporation, incorporated on September 11, 1912, with a capital stock of $15,000, divided into 150 shares of the par value of $100 each, and having its principal office in Chicago. The object for which it was formed was to establish, operate and control a theatre or theatres and to acquire, produce and exhibit therein theatrical attractions of various kinds. Sol H. Goldberg, Mark S. Goodman, Harry M. Lubliner and Joseph Trinz were the directors and all of the stockholders. Goldberg was the president, Goodman the secretary, and Lubliner the treasurer. The theatre building, located at No. 4708 Prairie avenue, Chicago, was in process of erection at the date the corporation was organized, and the corporation afterwards became the owner of the building and the land. The building was completed and the theatre opened to the public about April 3, 1913. One Alfred Hamburger was the owner of several theatre properties in Chicago, and was engaged in the business of buying and operating such properties. Some of these properties were operated in the name of a corporation, such as Alfred Theatre Company and Louise Amusement Company, of which companies Hamburger was the president and owned a majority of the stock. The Alfred Theatre Company was not incorporated until sometime in January, 1913. On October 1, 1913, a special meeting of the directors of the defendant company was held, at which all of the directors were present, and at which a resolution was unanimously adopted. It is therein recited that the defendant company is the owner of said theatre building and land; that the premises are subject to trust deeds securing bonds theretofore executed by said Lubliner and Trinz; that defendant company is also possessed of certain personal

plaintiff's damages at $8,[illegible], [illegible] for finding judgment for $4,188 against the defendant company was rendered.

The defendant company is an Illinois corporation, incorporated on September 14, 1912, with a capital stock of $18,000, divided into 180 shares of the par value of $100 each, and having its principal office in Chicago. The object for which it was formed was to establish, operate and control a theatre or theatres and to acquire, [illegible] and exhibit therein theatrical attractions of various kinds. [illegible] were the directors and all of the stockholders. Defendant was the president, Gardner the secretary, and Lindner the treasurer. The theatre building, located at [illegible] Drexel avenue, Chicago, was in process of erection at the time the corporation was organized, and the corporation commenced business as the owner of the building and the land. The building was completed and the theatre opened to the public about April [illegible], 1913. One Alfred Hamburger was the owner of several theatres properties in Chicago, and was engaged in the business of acquiring and operating such properties. [illegible] operated in the name of a corporation, [illegible] Theatre Company and Lincoln Amusement Company, of which corporations Hamburger was the sole stockholder and president [illegible]

until November in January, 1917. On October 5, 1917, a special meeting of the directors of the defendant company was held, at which all of the directors were present, and a resolution was unanimously adopted. It is therein recited that the defendant company is the owner of said theatre building and land; that the property is subject to trust deeds covering bonds hereinafter mentioned by said Lindner and Gardner; that [illegible] company is also [illegible]

property used in the operation of said theatre upon said premises; that the Alfred Theatre Company has offered to purchase said premises and personal property and to pay therefor $10,000 in cash, and the further sum of $55,000 to be evidenced by notes, and to assume the encumbrance upon the premises of $20,000, and to that end has presented a contract embodying the terms and conditions of the sale; and that the directors are of the opinion that it is to the interest of defendant company to make such sale. It is then therein "resolved" that the president and secretary of the defendant company be authorized in its behalf to execute said contract, also a warranty deed conveying said premises to the Alfred Theatre Company, also a bill of sale of said personal property, and such other instruments necessary to effectuate the sale. Attached to said resolution and over the signatures of all of the stockholders and directors of the defendant company is the statement that "we and each of us do hereby ratify and approve the action taken at said metting and the sale of the property on the terms as provided in said contract." It further appears that on the same day, October 1, 1913, the said contract, warranty deed and bill of sale were duly executed by said officers and the sale duly consummated. As to the payment of the $55,000 mentioned in said resolution, the contract provided for the giving by the vendee of 55 notes of $1,000 each, the first payable on November 1, 1913, and one of the first day of each and every month thereafter.

Plaintiff testified in substance that he called on Goldberg and Goodman on November 18, 1912, and stated that he had a possible buyer for said theatre building and premises; that Goldberg said "all right" and further said that the price was $90,000, but that they would be willing to sell the same for $85,000; that on the following morning plaintiff informed Alfred Hamburger of said conversation, that on

property used in the operation of said theatre upon said premises; that the Alfred Theatre Company has offered to purchase said premises and personal property and to pay therefor $40,000 in cash, and the further sum of $55,000 to be evidenced by notes, and to assume the encumbrance upon the premises of $20,000, and to that end has presented a contract embodying the terms and conditions of the sale; and that the directors are of the opinion that it is to the interest of defendant company to make such sale. It is then therein "resolved" that the president and secretary of the defendant company be authorized in its behalf to execute said contract, also a warranty deed conveying said premises to the Alfred Theatre Company, also a bill of sale of said personal property, and such other instruments necessary to effectuate the sale. Attached to said resolution and over the signatures of all of the stockholders and directors of the defendant company is the statement that "we and each of us do hereby ratify and confirm the action taken at said meeting and the sale of the property on the terms as provided in said contract." It further appears that on the same day, October 1, 1913, the said contract, warranty deed and bill of sale were duly executed by said officers and the sale duly consummated. As to the payment of the $55,000 mentioned in said resolution, the contract provided for the giving by the vendee of 55 notes of $1,000 each, the first payable on November 1, 1913, and one of the first day of each and every month thereafter.

Plaintiff testified in substance that he called on Goldberg and Goodman on November 18, 1913, and stated that he had a possible buyer for said theatre building and premises; that Goldberg said "all right" and further said that the price was $60,000, but that they would be willing to sell the same for $55,000; that on the following morning plaintiff informed Alfred Hamburger of said conversation, that on

November 21st plaintiff again saw Goodman and told him that Hamburger offered $70,000 for said premises, that Goodman replied that that sum was not enough and that plaintiff should endeavor to find other purchasers; that on November 25th Goldberg, on being informed of Hamburger's offer, told plaintiff that they would not sell for that price, whereupon plaintiff again saw Hamburger who stated that he would have a thorough examination made of the premises; that on December 2nd Goldberg suggested to plaintiff that he see the other two stockholders of the defendant company, Lubliner and Trinz; that plaintiff subsequently had conversations with each of them regarding the proposed deal and that Lubliner said that they would not rent the theatre; that during the months of February and March, 1913, plaintiff endeavored to get the parties together for the purpose of bringing about the proposed sale, and that finally on March 22nd a meeting was had at which Goldberg, Goodman, Hamburger and plaintiff were present; that at this meeting Goldberg finally asked Hamburger if he was "interested in the theatre at $85,000," that Hamburger replied that he was and offered $10,000 in cash and the balance in deferred payments, and that Goldberg said that they wanted a larger cash payment; that subsequently Goldberg sailed for Europe; that on May 9, 1913, Goodman called at plaintiff's office and said that the fact that Goldberg was away was no reason why the proposed deal should not be consummated, that if it was consummated plaintiff would be entitled to a commission and that he (Goodman) wanted one-third of that commission; that to this proposition plaintiff said "all right" and thereupon plaintiff's commission was figured at 2½% on $85,000, or the sum of $2,125; that on May 20th Hamburger, Goodman and plaintiff met, and Hamburger offered $85,000 for the premises, $10,000 in cash and $6,000 per year, and

Goodman replied that he would put the proposition up to the other stockholders; that on June 19th Goldberg, having returned from Europe, inquired of plaintiff as to how the proposed deal was progressing; that plaintiff again saw Hamburger and the latter said he would pay $15,000 in cash and $6,000 a year on the basis of a purchase price of $85,000, and plaintiff reported this offer to Goldberg; that on August 5th Goldberg directed plaintiff to see if he could rent the theatre for $10,000 a year; that plaintiff took this offer to Hamburger who refused to consider renting the premises; that plaintiff did not again see Goldberg until September 30th, on which day, having heard that arrangements had been concluded for the sale of the premises, he called upon Goldberg; that at this interview Goldberg informed plaintiff that he had recently met Hamburger and a broker named Kipper, that the deal had been closed, that at the time of the closing of the deal Hamburger had said that he and Kipper "would take care of" plaintiff and that he (Goldberg) had replied that plaintiff was entitled to a commission as he had worked a long time on the deal; that at said interview Goldberg told plaintiff that he had agreed to pay Kipper $500 as a commission and that Hamburger had also agreed to pay Kipper $500 as a commission, and suggested that plaintiff enjoin him and Hamburger from paying Kipper; that plaintiff immediately thereafter saw Hamburger who denied that he had agreed to take care of plaintiff's commission; that on October 3rd Goldberg telephoned plaintiff inquiring if plaintiff had seen Hamburger and Kipper and that, upon plaintiff informing him of Hamburger's disclaimer, Goldberg said that in his opinion plaintiff had earned his commission and ought to get it, and again suggested injunction proceedings; that on October 7th plaintiff told Goldberg that he looked to him, and not to Hamburger or Kipper, for his commission; that plaintiff had never received any commission from the defendant

Goodman replied that he would put the proposition up to the owner aforesaid; that on June 10th following, having returned from Europe, he offered of plaintiff to buy the property and was prevented; that plaintiff, with Hamburger and the latter said he would buy 113,000 in cash and $6,000 a year on the basis of a purchase price of $87,000, and plaintiff reported this offer to Goldberg; that on August 8th Goldberg directed plaintiff to say if he would meet the offer for $10,000 a year; that plaintiff took this offer to Hamburger who refused to consider trading the property; that plaintiff did not again see Goldberg until September 20th, on which day, having learn that arrangements had been concluded for the sale of the premises, he called upon Goldberg; that at this interview Goldberg informed plaintiff that he had recently met Hamburger and a broker named Kipper, that the deal had been closed, that at the time of the closing of the deal Hamburger had said that he and Kipper "would take care of" plaintiff and that he (Goldberg) had negotiated that plaintiff was entitled to a commission as he had worked a long time on the deal; that at said interview Goldberg told plaintiff that he had agreed to pay Kipper $800 as a commission and that Hamburger had also agreed to pay Kipper $800 as a commission, and suggested that plaintiff settle him and Hamburger from getting blame; that plaintiff immediately discovered one Hamburger who looked that he had agreed to take care of plaintiff's commission; that on October 1st Goldberg telephoned plaintiff inquiring if plaintiff had seen Hamburger and Kipper and, upon plaintiff informing him of Hamburger's absence, Goldberg said that in his opinion plaintiff had already Mr. consulted and ought to get it, and again suggested injunction proceedings; that on October 7th plaintiff had left Hamburger and Kipper, and not to Hamburger or Kipper, for his commission; that plaintiff had never received any commission from the deal, notwithstanding

company, that he had been in the real estate business in Chicago for 13 years and that the usual commission for acting as a broker in a sale of real estate of the amount in question is 2½% of said amount, $85,000; and that during all his negotiations looking to the sale of said premises he was never told by Goldberg or Goodman or anyone that defendant company had withdrawn the premises from the market, or that he (plaintiff) should cease his efforts to effectuate a sale.

Three witnesses - Hamburger, Goodman and Goldberg - testified on behalf of the defendant company. In many particulars their testimony corroborates that of plaintiff, while in other particulars it is at variance therewith. Hamburger testified in substance that long before the theatre in question was opened he told plaintiff that he would like to purchase it, provided he could get it before it was opened; that prior to the meeting of March 22, 1913, he told plaintiff that he would pay $70,000 for the premises and, subsequently, that he would pay as high as $85,000; that at the solicitation of plaintiff he first met Goldberg and Goodman regarding the proposed deal at said meeting of March 22nd, and that he then for the first time learned that Goldberg was an old friend of his; that at said meeting he offered $85,000 for the premises - $10,000 in cash and the balance in deferred payments of $500 per month, and that Goldberg said he would submit the offer to the other stockholders of the defendant company; that just before Goldberg sailed for Europe (March 29th) Goldberg advised him that defendant company had decided not to consider a sale of the premises for the time being; that he did not see Goldberg after he returned from Europe (June 1st) until the latter part of September, 1913, a few days before the sale was consummated; and that plaintiff did not see him (Hamburger) regarding the deal subsequent to the month of April, 1913, and

company, that he had been in the real estate business in Chicago for 16 years and that the usual examination for renewing as a broker in a sale of real estate of the amount in question is 2½% of said amount, $25,000; and that during all his negotiations looking to the sale of said premises he was never told by Goldberg or Goodman or anyone that defendant company had withdrawn the premises from the market, or that he (plaintiff) should cease his efforts to effectuate a sale.

Three witnesses - Hamburger, Goodman and Goldberg - testified in behalf of the defendant company. On many pleadings their testimony corroborates that of plaintiff, while in other particulars it is at variance therewith. Hamburger testified in substance that long before the premises in question was opened he told plaintiff that he would like to purchase it, provided he could get it before it was opened; that prior to the meeting of March 22, 1913, he told plaintiff that he would pay $70,000 for the premises and, subsequently, that he would pay as high as $75,000; that as the solicitations of plaintiff he first met Goldberg and Goodman regarding the proposed deal at said meeting of March 22nd, and that he then for the first time learned that Goldberg was an old friend of his; that at said meeting he offered $65,000 for the premises - $10,000 in cash and the balance in deferred payments of $400 per month, and that Goldberg said he would submit the offer to the other stockholders of the defendant company; that just before leaving Miami for Europe (June 1st) plaintiff informed him that defendant company had decided not to consider a sale of the premises for the time being; that he did not see Goldberg after he returned from Europe (June 1st) until the latter part of September, 1913, a few days before the sale was consummated; and that plaintiff did not see him (Hamburger) regarding the deal subsequent to the month of April, 1913.

prior to the date the sale was consummated. Hamburger further testified that during the month of April, 1913, and after the theatre was opened, he told plaintiff that he "was not interested in it any more," yet he also testified that "I mentioned it to Mr. Kipper some time in September that I heard the theatre wasn't doing so well, and he should find out if there was a chance of me getting it," that Kipper reported several times, that a meeting with Goldberg was arranged at which plaintiff was not present, that finally the sale was consummated, and that subsequently he paid Kipper $500 as a commission. Both Goodman and Goldberg corroborated plaintiff as to the preliminary conversations plaintiff had with them relative to the premises being for sale and their willingness that plaintiff should procure a purchaser, which conversations they may took place in the early part of January, 1913. And their testimony is in substantial accord with that of plaintiff as to plaintiff first bringing to them Hamburger as a prospective purchaser, and as to the offer of $85,000 for the premises made by Hamburger at the meeting of March 22nd. Goodman admits having the conversation with plaintiff, after Goldberg went to Europe, relative to his getting a portion of plaintiff's commission in case the deal was consummated. His version of the conversation, however, is that the proposition as to a division of the commission came from plaintiff, and that he at that time told plaintiff that nothing further could be done until Goldberg returned. And Goldberg admits having the conversation with plaintiff as to the latter's commission immediately after arrangements had been made direct with Hamburger for closing the deal, and that he suggested injunction proceedings, but he denies saying that plaintiff was entitled to any commission. He further testified in substance that he then told plaintiff that, although plaintiff had presented Hamburger as a purchaser and many nego-

prior to the date the sale was consummated. Hamburger further testified that during the month of April, 1913, and after the theatre was opened, he told plaintiff that he "was not interested in it any more," yet he also testified that "I mentioned it to Mr. Kipper some time in September that I heard the theatre wasn't doing so well, and he should find out if there was a chance of me getting it," that Kipper reported several times, that a meeting with Goldberg was arranged at which plaintiff was not present, that finally the sale was consummated, and that subsequently he paid Kipper $500 as a commission. Both Goodman and Goldberg corroborated plaintiff as to the preliminary conversations plaintiff had with them relative to the premises being for sale and their willingness that plaintiff should procure a purchaser, which conversations they may took place in the early part of January, 1913. And their testimony is in substantial accord with that of plaintiff as to plaintiff's first bringing to them Hamburger as a prospective purchaser, and as to the offer of $85,000 for the premises made by Hamburger at the meeting of March 22nd. Goodman admits having the conversation with plaintiff, after Goldberg went to Europe, relative to his getting a portion of plaintiff's commission in case the deal was consummated. His version of the conversation, however, is that the proposition as to a division of the commission came from plaintiff, and that he at that time told plaintiff that nothing further could be done until Goldberg returned. and Goldberg admits having the conversation with plaintiff as to the latter's commission immediately after arrangements had been made direct with Hamburger for closing the deal, and that he suggested injunction proceedings, but he denies saying that plaintiff was entitled to any commission. He further testified in substance that he then told plaintiff that, although plaintiff had presented Hamburger as a purchaser and many nego-

tiations had been had, the defendant company had called off the proposed deal several months previously, and that plaintiff had never been employed as broker for defendant company, and that new negotiations had been entered into through another broker and that the sale was consummated without the assistance of plaintiff.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It is contended by counsel for defendant company that, assuming that Goldberg and Goodman as officers of defendant company employed plaintiff as a broker to effectuate a sale of the premises, they had no authority in the absence of a resolution of the board of directors to bind defendant company by such employment. It appears that Goldberg was the president of the corporation and active in its affairs, that Goodman, his brother-in-law, was the secretary, that these two men together with Lubliner and Trinz were the directors and all of the stockholders of the corporation, that Lubliner and Trinz knew that plaintiff was acting as a broker in negotiations looking to the sale of the premises and made no objections, and that when the contract of sale was finally made all the directors and stockholders in writing ratified the same. Under the evidence we do not think there is any merit in the contention. (Cozzens & Beaton Co. v. Western Ranch Co., 112 Ill. App. 309, 311; Atwater v. American Exch. Bank, 152 Ill. 605, 620; Snyder Bros. v. Bailey, 165 Ill. 447, 452; Union Surety Co. v. Tenney, 200 Ill. 349, 352.)

And we are of the opinion that the evidence sufficiently shows that plaintiff was employed to act as a broker in behalf of defendant company to bring about, if

strikers had been had, the defendant company had called off the proposed deal several months previously, and that plaintiff had never been employed as broker for defendant company, and that new negotiations had been entered into through another broker and that the sale was consummated without the assistance of plaintiff.)

III. Previous [illegible]

It is contended by counsel for defendant company that, assuming that Goldberg and Goodman as officers of defendant company employed plaintiff as a broker to effectuate a sale of the premises, they had no authority in the absence of a resolution of the board of directors to bind defendant company by such employment. It appears that Goldberg was the president of the corporation and active in its affairs, that Goodman, his brother-in-law, was the secretary, that these two men together with Lublinsky and Tribus were the directors and all of the stockholders of the corporation, that Lublinsky and Tribus knew that plaintiff was acting as a broker in negotiations looking to the sale of the premises and made no objections, and that when the contract of sale was finally made all the directors and stockholders in existing relation the same. Under the evidence we do not think there is any merit in the contention. (Gorrono v. Beeson Co. v. Lockwood (p.), 118 App. Div. 807, 103; Lindley v. [illegible] Co., [illegible] App. Div. [illegible]; Lerner v. Cohen, 147 App. Div. [illegible]; [illegible] v. Tenney, 200 App. Div. 240, 252.)

And we are of the opinion that the evidence sufficiently shows that plaintiff was employed to act as a broker in behalf of defendant company to bring about, if

possible, a sale of the premises for $85,000, and with the understanding that he should receive, if successful, the usual and customary commission for his services. (Knotts v. Lake Shore, etc., R. Co., 172 Ill. App. 550, 555.)

It is also contended by counsel that plaintiff is not entitled to receive any commission because plaintiff's employment as a broker was terminated by defendant company before the sale was finally consummated, and because a broker named Kipper, and not plaintiff, was the procuring cause of the sale. We can not say that it was disclosed by a preponderance of the evidence that plaintiff's employment was at any time terminated by defendant company or that he abandoned his undertaking. It clearly appears that plaintiff first presented to defendant company a purchaser, who offered to pay and was able to pay $85,000 for the premises, and to whom the premises were subsequently sold for that sum. Whether Hamburger was acting for himself in making the purchase or as agent ofmthe Alfred Theatre Company, of which he was president and the controlling stockholder, makes no difference as to plaintiff's right to recover a commission. (Henry v. Stewart, 185 Ill. 448, 453.) And we think that the evidence shows that plaintiff and not Kipper was the procuring cause of the sale, notwithstanding the fact that plaintiff was not present when the contract of sale at $85,000 was executed, and notwithstanding the further fact that the amountwhich the purchaser was to pay each month on the deferred payments was greater than had been previously offered. According to Hamburger's testimony Kipper was employed by Hamburger as his agent, and we think the record discloses a disposition on the part of the officers of the defendant company, after the appearance of Kipper in the negotiations, to themselves close the deal and appropriate the fruits of plaintiff's prior negotiations without payment

possible, a sale of the premises for $28,000, and with the understanding that he should receive, if successful, the usual and customary compensation for his services. (Martin v. Lake Shore, 114 N.Y. 171 [1889]; cf. Id., 200, 204.)

It is also contended by counsel that plaintiff is not entitled to receive any commission because plaintiff's employment as a broker was terminated by defendant company before the sale was finally consummated, and because a broker named Kipper, and not plaintiff, was the procuring cause of the sale. We can not say that it was disclosed by a preponderance of the evidence that plaintiff's employment was at any time terminated by defendant company or that he abandoned his undertaking. It clearly appears that plaintiff first presented to defendant company a purchaser, who offered to pay and was able to pay $28,000 for the premises, and to whom the premises were subsequently sold for that sum. Whether Hamburger was acting for himself in making the purchase or as agent of the Alfred Theatre Company, of which he was president and the controlling stockholder, makes no difference as to plaintiff's right to recover a commission. (Henry v. Stowell, 185 III. 448, 453.) And we think that the evidence shows that plaintiff and not Kipper was the procuring cause of the sale, notwithstanding the fact that plaintiff was not present when the contract of sale at $28,000 was executed, and notwithstanding the further fact that the arrangement the purchaser was to pay each month on the deferred payments was greater than had been previously offered. According to Hamburger's testimony Kipper was employed by Hamburger as his agent, and we think the record discloses a disposition on the part of the officers of the defendant company, after the appearance of Kipper in the negotiations, to themselves close the deal and appropriate the profits of plaintiff's prior negotiations without payment

of a commission to him. In our opinion the finding and judgment were fully warranted. In Wilson v. Mason, 158 Ill. 304, 309, it is said: "The duty of a broker, who is employed to sell real estate, is to find and produce to the vendor a purchaser, who is ready, willing and able to complete the purchase as proposed. * * If the principal accepts the purchaser thus presented, either upon the terms previously proposed or upon modified terms then agreed upon, and a valid contract is entered into between them, the commission is earned." (See, also, Hafner v. Herron, 165 Ill. 242, 250; Henry v. Stewart, supra; Stewart v. Mather; 32 Wis. 344; Rigdon v. More, 226 Ill. 382, 387.) In the case last cited it is said: "Through the efforts of plaintiff in error negotiations for the sale by the purchaser were brought about, and these negotiations continued until the sale was consummated." * * Peters, who finally concluded the negotiations, was, as said by the Appellate Court, connected with Fetzer, who represented the purchaser. But if plaintiff in error had been employed by the seller to find a purchaser for the property, and thourgh his efforts the owner had been brought into communication with the purchaser, plaintiff in error could not be deprived of his commissions because the owner of the property took up and completed the negotiations himself or through another party."

It is further contended by counsel that, as it appears from plaintiff's own testimony that during Goldberg's absence in Europe plaintiff assented to Goodman's proposition that plaintiff pay Goodman a portion of his commission in case the sale was consummated, plaintiff was guilty of such fraud or misconduct towards the defendant company as bars his right of recovery of any commission. Under all the facts in evidence we can not agree with the contention. The conversation

of a commission to him. In our opinion the finding and judgment were fully warranted. In Wilson v. Lyman, 220 Ill. 304, 309, it is said: "The duty of a broker, who is employed to sell real estate, is to find and produce to the owner a purchaser, who is ready, willing and able to complete the purchase on proposed. * * If the principal accepts the purchaser thus presented, either upon the terms previously proposed or upon modified terms then agreed upon, and a valid contract is entered into between them, the commission is earned." (See, also, Thomas v. Barron, 220 Ill. 444; Henry v. Stewart, supra; Stewart v. Tucker; 23 Ala. 814; Bigelow v. Moss, 206 Ill. 388, 397.) In the case last cited it is said: "Through the efforts of plaintiff in many negotiations for the sale by the purchaser were brought about, and these negotiations continued until the sale was consummated. * * Peters, who finally completed the negotiations, was, as said by the Appellate Court, connected with Pelton, who represented the purchaser. But if plaintiff in error had been employed by the seller to find a purchaser for the property, and through his efforts the owner had been brought into communication with the purchaser, plaintiff in error could not be deprived of his commissions because the owner of the property then so and completed the negotiations himself or through another broker."

It is further contended by counsel that, as it appears from plaintiff's own pleadings that defendant's property was in fact purchased by the wife of the defendant, plaintiff in error could not recover in this case. Under all the facts in evidence we can not agree with the contention. The conversation

had between plaintiff and Goodman was subsequent to the time that plaintiff had presented Hamburger as a purchaser and the latter had offered $85,000 for the premises, $10,000 in cash and the balance in deferred payments. It does not appear that plaintiff in his negotiations with Hamburger was guilty of any improper acts at variance with his duty towards defendant company, his principal; neither does it appear that plaintiff's assent to Goodman's proposition assisted in any way in bringing about the sale.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

had between plaintiff and Gossmann the subsequent to the time that plaintiff had presented Hamburger to Gossmann and the latter had offered $25,000 for the premises, $10,000 in cash and the balance in deferred payments. It does not appear that plaintiff in his negotiations with Hamburger or Gossmann of any improper acts or variance with his duty towards defendant company, his principal; neither does it appear that plaintiff's assent to Gossmann's proposition resulted in any way in weighing about the sale.

The judgment of the municipal court is affirmed.

327 - 21311

HIRAM D. WAGNER et al., Appellants, vs. H. H. EVANS et al., Appellees.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

199 I.A. 288

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On December 11, 1913, Hiram D.Wagner and 77 other complainants, former bondholders of the Interstate Independent Telephone and Telegraph Company (hereinafter referred to as the Interstate Company), a New Jersey corporation, filed a bill in the Circuit Court of Cook County against H.H.Evans and B.E.Sunny and the following named corporations: Chicago Telephone Company, Central Union Telephone Company, American Telephone and Telegraph Company, and the First Trust and Savings Bank of Chicago,defendants. The bill alleges inter alia that complainants had been the owners of 778 bonds of the Interstate Company of the par value of $778,000, and that they held stock of the Interstate Company of the par value of $778,000, which stock had been given them as purchasers of said bonds "as a bonus"; that prior to the month of June, 1910, the American Telephone and Telegraph Company owned a controlling interest in the capital stock of the Chicago Telephone Company, carrying on a telephone business in Chicago and its suburbs, and of the Central Union Telephone Company, engaged in the telephone business in Illinois outside of Chicago, and that said corporations are known as "Bell" companies; that at and prior to June, 1910, the Interstate Company was doing business in certain named cities in Illinois as a competitor of said Bell companies; that the defendant H. H. Evans was president and a member of the

HIRAM D. VARNER et al.,
Appellants,

vs.

[illegible] et al.,
Appellees.

AFTER THE CHANCERY COURT,
[illegible] COUNTY.

199 Ill. 288

MR. PRESIDENT JAMESON DELIVERED THE OPINION OF THE COURT.

On December 11, 1911, Hiram D. Varner and 17 other complainants, former bondholders of the Interstate Independent Telephone and Telegraph Company (hereinafter referred to as the Interstate Company), a New Jersey corporation, filed a bill in the Circuit Court of Cook County against H.N. Byers and B.J. Conroy and the following named corporations: Chicago Telephone Company, Central Union Telephone Company, American Telephone and Telegraph Company, and the First Trust and Savings Bank of Chicago, defendants. The bill alleges later also that complainants had been the owners of 775 bonds of the Interstate Company of the par value of $775,000, and that they held each of the Interstate Company of the par value of $775,000, which stock had been given them as purchasers of said bonds "as a bonus"; that prior to the month of June, 1911, the American Telephone and Telegraph Company owned a controlling interest in the capital stock of the Chicago Telephone Company, carrying on a telephone business in Chicago and its suburbs, and of the Central Union Telephone Company, engaged in the telephone business in Illinois outside of Chicago, and that these corporations are known as "Bell" companies; that at the time to June, 1911, the Interstate Company was doing business in certain named cities in Illinois as a competitor of the Bell Companies; that the defendant H. N. Byers was President and a member of the

board of directors of the Interstate Company from its organization until some time in September, 1910, and that the defendant B. E. Sunny was an officer and director in said Bell companies; that prior to June, 1910, the Interstate Company's business had been steadily increasing and that it had always promptly paid the interest on its bonds and promptly met all of its obligations; that during the months of March, April and May, 1910, said Bell companies, acting through Sunny, and Sunny individually "entered into a conspiracy" with Evans to remove the Interstate Company as a competitor and rival of said Bell companies, and that Evans, "in violation of his trust and obligations" as an officer and director of the Interstate Company "fraudulently and unlawfully" agreed to aid and assist Sunny in securing a controlling interest in the Interstate Company and in "wrecking" its business; that they agreed among themselves to "endeavor to depreciate the market price" of the stock and bonds of the Interstate Company so that the same could be procured at the lowest possible price, that Evans should send out letters and circulars "calculated and adapted to depreciate the market value of said bonds," that when the value of the bonds had become sufficiently depreciated the Bell companies would purchase a majority of them, with the bonus stock belonging thereto, at 66-2/3% of their face value, and that upon the consummation of said purchase the Bell companies would pay Evans the difference between 66-2/3% of the par value of said bonds and whatever price was paid to the holders thereof; that in pursuance of the conspiracy Evans caused to be sent out to complainants and other holders of said bonds such letters and circulars, and that as a result "certain" complainants and "certain" other bondholders consulted with Evans, and that he "fraudulently" expressed the opinion "to such of the bondholders as so advised with him" that any holder who could sell his bonds for 60% of the par value thereof was fortunate, and "falsely and fraudulently represented" that he was

board of directors of the Interstate Company from its organization
until some time in September, 1910, and that the defendant G. A.
Lunny was an officer and director in said well companies; that
prior to June, 1910, the Interstate Company's business had been
financially increasing and that it had since promptly paid the in-
terest on its bonds and promptly met all of its obligations; that
during the months of March, April and May, 1910, said well compan-
ies, acting through Lunny, and Lunny individually "enticed into a
conspiracy" with Evans to ruin the Interstate Company as a com-
petitor and rival of said well companies, and that Lunny, in vio-
lation of his trust and obligations" as an officer and director
of the Interstate Company "fraudulently and wrongfully" agreed to
aid and assist Lunny in securing a controlling interest in the
Interstate Company, and in "wrecking" its business; that they entered
among themselves to "endeavor to depreciate the market price" of
the stock and bonds of the Interstate Company so that its bonds
could be procured at the lowest possible price, that Lunny should
hand out letters and circulars "calculated and designed to depre-
ciate the market value of said bonds," that upon the value of the
bonds had become sufficiently depreciated the Bell companies would
purchase a majority of them, with the bonds then belonging to
Lunny, at 65-4\5% of their face value, and that upon the consummation
of said purchase the Bell companies would pay the difference
between 65-4\5% of the par value of said bonds and whatever price
had paid to the holders thereof; that in pursuance of the conspir-
acy Evans caused to be sent out to subscribers and other persons
of said bonds such letters and circulars, and that such letters
"certain" complainants and "certain" other bondholders contained
with Evans, and that he "fraudulently" expressed the opinion "in
of the bondholders so as to advise with him" that any holder
could sell his bonds for 60% of the par value thereof was for-
ble, and "falsely and fraudulently represented" that he was

willing to sell all such bonds which he held at said price, and that to "divers" complainants and other bondholders he made "false statements" as to the financial and physical condition of said Interstate Company; that the result of Evans' actions was to cause a "loss of confidence" on the part of complainants and other bondholders as to the value of said bonds and as to the financial soundness of the Interstate Company, and to depreciate the market price of said bonds; that complainants (except Bailey and Stromberg), fearing a further depreciation, agreed to sell "and did sell" their bonds (together with the bonus stock received therewith) for 60% of their par value; that complainant Bailey sold his bonds of the par value of $192,000 for $101,000, and complainant Stromberg sold 56 of his bonds for 45% of their par value and 44 of his bonds for 44½% of their par value; that in order to secure these prices a "majority of complainants" were obliged to and did deliver with their bonds stock of the Interstate Company of equal par value, and that complainants delivered said bonds and stock to the defendant, First Trust and Savings Bank of Chicago, which had been designated as the place where the same should be deposited, and received payment for the "bonds" at the rates above mentioned; that said bank received the funds to make said payments from said Bell companies or from said Sunny, and said bonds, with the bonus stock attached, were delivered by said bank to said Bell companies or Sunny, acting in their behalf; that said bank should be required to discover the source from which it received said funds, and furnish all the details of said transactions; that complainants, at the times of said several deliveries of said bonds and stock, did not know and had no means of ascertaining who was the purchaser of the same, but believed that the several prices offered were the prices which said purchaser was paying therefor; that they did not then know of said "conspiracy" or of the "fraudulent and unlawful profit" resulting to said Evans as his "reward" for the

willing to sell all such bonds which he held at this price, and that he "divvied" commissions and other backsheesh in a "lively shakedown" on the Thursday and Friday conditions of the Interstate Company; that the result of those' rackets was to leave a "real surplus" on the part of complainants and other bondholders as to the value of said bonds and as to the financial soundness of the Interstate Company, and to increase the market price of said bonds; that complainants (among Bailey and Schwenker) feeling a further depreciation, agreed to sell (and did sell) their bonds (together with the other about receives bondholds) for 80% of their par value; that complainant Bailey sold his bonds of the par value of $19,000 for $15,000, and complainant Schwenker sold 55 of his bonds for 60% of their par value and 4% of his bonds for 44% of their par value; that in order to secure these prices a "majority of complainants" were obliged to and did deliver with their bonds stock of the Interstate Company of equal par value, and that complainants delivered said stock and bonds to the defendant, First Trust and Savings Bank of Chicago, which had been designated as the place where the same should be deposited, and therefore payment for the "bonds" at the rates above mentioned; that said bank received the funds to make said payment from said defendants paying a less sum money, and paid bonds, with the bonds stock attached, were delivered by said bank to said defendants or agents, acting in their behalf; that said bank should be required to discover the source from which it received said funds, and further that the details of said transactions; [illegible] the times or date of said payment [illegible] that know one had no knowledge of concerning the [illegible] of the same, but believed that the second [illegible] the prices which said [illegible] were paying, [illegible]; that they did not know how of said "shakedown" or of the "backsheesh" mentioned; prayed that so much thereof as may "remain" by the

carrying out of the said conspiracy; that, after the payment to complainants and "such other bondholders as had deposited their bonds," there remained in the hands of said bank over $90,000, which had been there deposited by said purchaser and "which fund in equity and good conscience belonged to and was the property of complainants and other of said bondholders"; that said fund was "wrongfully and in fraud of the rights" of complainants paid to Evans or to Sunny as their reward for carrying out said conspiracy; that said bonds with the bonus stock attached, so deposited with said bank, amounted to a majority of the outstanding bonds and stock of the Interstate Company, and that said bank refused to accept or purchase any more of said bonds with said bonus stock attached; that "all of the above acts" on the part of Evans, Sunny and the Bell companies were done in pursuance of a "false and fraudulent purpose, design and conspiracy" to secure control of the Interstate Company, to wreck and destroy its properties and business, to "cheat and defraud" complainants out of a large part of the real market value of said bonds, to-wit, the difference between 66-2/3% of the par value of same and the amount actually received by complainants therefor, and to forever destroy said Interstate Company as a competitor of said Bell companies; that all of the defendants had notice that Evans, as president and director of the Interstate Company, was a "trustee" of the property and assets of said company for the benefit of the owners of said bonds; that the price paid for said bonds was less than the reasonable market value thereof prior to the time of said several acts done by Evans, that complainants and other of the holders thereof were "induced" to accept a price below said 66-2/3% of the par value thereof solely by reason of the "false and fraudulent acts and representations" of said Evans and that they were "wholly ignorant" of said conspiracy; that "said agreement" made by Evans with Sunny of the Bell companies was in violation of his obligations and duties as an officer and director of the Interstate Company and of the

"trust relation" which he bore to complainants as "creditors" of said company, and that said fund of $90,000 ought in equity and good conscience to be decreed "a trust fund" in the hands of Evans, and such other defendants as participated in the distribution thereof, and be held for the benefit of complainants and such other bondholders as may be entitled thereto; that complainants did not know until after said sales of the bonds that said Sunny and the Bell companies were interested in the transactions; and that none of complainants was in any manner a party to said "unlawful conspiracy and combination," and had no knowledge thereof until after said delivery of said bonds by them as aforesaid.

The bill prays for a discovery as to the "transactions, contracts and agreements" involved in the purchase of the bonds, what moneys were paid therefor, and by whom and where; asks for the production of all writings, checks and receipts relating thereto; that said bank be required to disclose the source from which it received said fund with which payment for said bonds was made, and to whom was paid the balance of the fund remaining after the payments to complainants and others for said bonds; that Evans and Sunny account for the amount received on account of the purchase price of the bonds from the other defendants, and that they, and such other defendants as participated in the fund, be required to pay to complainants, and such other similarly situated as may join in this bill, the proportionate share due each of said fund, and interest on such shares, and that Evans and Sunny be decreed to have held such sums as trustees for complainants and such others, and be compelled to make distribution, etc.

Each of the defendants severally filed a general and special demurrer to the bill, and on November 4, 1914, the court entered an order sustaining said demurrers, and each of them, and giving leave to complainants to file an amended bill within ten days. On November 17, 1914, the court entered a final order dis-

missing the bill as to all defendants for want of equity, in which order it is recited that complainants had not filed an amended bill within the time limited and had elected to stand by their original bill. From such final order this appeal is prosecuted.

In said order of November 4, 1914, the court held as grounds for sustaining said demurrers: (1) that the allegations of the bill as to a conspiracy between the defendants, or certain of them, are too uncertain, indefinite and insufficient to support any decree; (2) that the allegations of fraud and deceit are too general and too indefinite to constitute a ground for equitable jurisdiction; (3) that the bill is multifarious; (4) that the several complainants, if they have any cause of action at all, have an adequate and appropriate remedy at law; (5) that complainants cannot invoke the aid of a court of equity on the ground of a multiplicity of suits, because it appears from the bill that if complainants have any cause of action each will be afforded an entire adequate remedy by means of a single action at law; and (6) that defendant Evans is not shown by said bill to have sustained such fiduciary relations with the several complainants as authorizes them to maintain a suit in equity on the ground that a trust is involved.

After a careful reading of the bill and a consideration of the arguments of counsel and of some of the authorities cited, we are of the opinion that the court did not err in sustaining said demurrers to complainants' bill and in dismissing the same for want of equity, complainants having elected to stand by said bill, and for the reason that the allegations thereof as to a conspiracy and as to fraud and deceit are too general, indefinite and insufficient to warrant a court of equity in granting the relief prayed for, and that it is not sufficiently disclosed by the bill that the defendant Evans sustained such fiduciary relations with the complainants as warrants the maintenance of

missing the bill or to fill or correct the text of a bill, in which order it is needed this complaint can be not filed or amended bill within the time limited or the [illegible] by their original bill. Upon such final order this court [illegible] be presented.

In said order of December 4, 1911, the [illegible] as grounds for constitutional amendment: (1) that the allegations of the bill as to a conspiracy between the [illegible] wife, or members of them, are too uncertain, indefinite and insufficient to support any decree; (2) that the allegations of fraud and deceit are too general and not in detail to constitute a ground for equitable jurisdiction; (3) that the bill is multifarious; (4) that the general complainants, if they have any cause of action at all, have an adequate and complete remedy at law; (5) that complainants cannot invoke the aid of a court of equity on the ground of a multiplicity of suits, because it appears from the bill that if complainants have any cause of action such will be referred to entirely adequate remedy by means of a simple action at law; and (6) that [illegible] cause is not shown by said bill to have constituted such a conspiracy relations with the general complainants as sufficient to maintain a suit in equity on the ground that a fraud is concerned.

After a careful reading of the bill and a careful consideration of the arguments of counsel and of some of the authorities cited, we are of the opinion that the court did not err in sustaining said demurrers to complainants' bill or in dismissing the for want of equity, complainants having elected to stand on said bill, and for the reason that the allegations thereof [illegible] sufficiently pled to be final and [illegible], multiplicity and insufficient to warrant a court of equity in granting the relief prayed for, and that it is not sufficiently alleged by the bill that the defendants have conspired and [illegible] relations with the complainants.

the action on the ground that a trust is involved. We deem it unnecessary to discuss in detail the several points here urged by counsel for complainants as reasons why the decree should be reversed. The decree of the Circuit Court is affirmed.

AFFIRMED.

113 - 21503

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

CLARENCE A. SAMUEL,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

199 I.A. 294

STATEMENT OF THE CASE. It is sought by this writ of error to reverse a judgment of the Municipal Court wherein Clarence A. Samuel, defendant, was adjudged to be guilty of contempt of court and sentenced to pay a fine of $200 and in default of the payment thereof that he be committed to the County jail, etc.

On March 17, 1915, an information, signed and sworn to by Harry J. Berman, an attorney at law at Chicago, was filed in said court. The informant alleged, in substance, that on March 16, 1915, there was pending before the Honorable John Stelk, one of the associate judges of said court, a certain garnishment proceeding entitled, "Haythorne for use of John Miller v. Chicago & Northwestern Railway Co."; that on said March 16th the defendant, Samuel, caused to be delivered to one Jesse Phillips, an attorney at law at Chicago, and to be filed in said garnishment suit a certain petition for a change of venue signed by said Samuel, as petitioner, and verified by his affidavit; that in said petition Samuel alleged that "he was the agent for the plaintiff" in said suit, that he feared that he would not receive a fair and impartial trial if said suit was tried before Judge Stelk, "because said judge is prejudiced against the petitioner," and that "said prejudice first came to the knowledge of petitioner on or about October

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

va.

MONTGOMERY COURT,
OF CHICAGO,

ERROR TO

CLARENCE A. DAMUSL,
Plaintiff in Error.

STATEMENT OF THE CASE. It is sought by this writ of error to reverse a judgment of the Municipal Court wherein Clarence A. Damusl, defendant, was adjudged to be guilty of contempt of court and sentenced to pay a fine of $500 and in default of the payment thereof that he be committed to the County Jail, etc.

On March 17, 1913, an information, signed and sworn to by Harry T. Herman, an attorney at law as complainant, was filed in said court. The information alleged, in substance, that on March 16, 1913, there was pending before the Honorable John Stelk, one of the associate judges of said court, a certain garnishment proceeding entitled, "Mayfarers for use of John Miller v. Chicago & Northwestern Railway Co."; that on said March 16th the defendant, Damusl, caused to be delivered to one Jesse Phillips, an attorney at law at Chicago, one to be filed in said garnishment suit a certain petition for a change of venue signed by said Damusl, as petitioner, and verified by his affidavit; that in said petition Damusl alleged that "he was the agent for the plaintiff" in said suit, that he "feared that he would not receive a fair and impartial trial if said suit was tried before Judge Stelk, "because said judge is prejudiced against the petitioner," and that "said prejudice first came to the knowledge of petitioner on or about October

3, 1914"; that Samuel caused said petition to be presented before Judge Stelk, and a motion was then and there made by said Phillips for a change of venue to some other judge of said court, which motion was denied; that Judge Stelk was first elected one of the judges of said court on November 1, 1914, and did not assume the duties of the office until December 7, 1914; that Samuel filed the affidavit of garnishee summons on March 1, 1915, and that he, by said Phillips as attorney, appeared before Judge Stelk in said garnishment suit on March 6th and March 15th, 1915, and made motions therein and obtained orders thereon; that Samuel was not acquainted with Judge Stelk prior to the first case which he (Samuel) had in said court, and that no knowledge came to him on or about October 3, 1914, that Judge Stelk was prejudiced against him; and that Samuel did not present to the court with said petition any power of attorney authorizing him to appear as agent of the plaintiff in said suit and to pray for a change of venue.

On March 17, 1915, the information was presented to Judge Stelk and an order was entered that Samuel show cause, if any he had, within 5 days why he should not be punished for contempt of court for reasons as set forth in the information, and leave was granted the informant to file interrogatories instanter which Samuel was ruled to answer within 5 days, and eleven interrogatories were filed.

On March 22, 1915, Samuel filed an answer, verified by his affidavit, to the rule and to the interrogatories, in which he alleged in substance that he was and had been for four years engaged with one Herman Frank in carrying on a general collection business in the Hartford building, Chicago; that about two years prior to March, 1915, John Miller (beneficial plaintiff in the garnishment suit) had placed with respondent and Frank claims aggregating about $3,000, for

1, 1914"; that Hummel caused said petition to be presented before Judge Stelik, and a motion was then and there made by said Phillips for a change of venue to some other judge of said county, which motion was denied; that Judge Stelik and Flint elected one of the judges of said court on January 1, 1914, and did not assume the duties of the office until December 7, 1914; that Hummel filed the affidavit of prejudice mentioned on March 1, 1914, and that he, by said Phillips as attorney, requested Judge Stelik to call preliminary pretrial on March 4th and March 18th, 1914, and that motions directly and objected and excepted thereto; that Hummel was not acquainted with Judge Stelik prior to his first case with the [illegible] had in said court, and that no prejudice had existed on his part against Stelik; that Judge Stelik was prejudiced against him; and that Hummel did not present to the court with said petition, any power of attorney authorizing him to appear as agent of the plaintiff in said suit and to pray for a change of venue.

On March 17, 1915, the information was presented to Judge Stelik and an order was entered that Hummel show cause, if any he had, within 5 days why he should not be punished for contempt of court for reason as set forth in the information, and leave was granted the defendant to file interrogatories herein; which Hummel was ordered to answer within 4 days, and eleven interrogatories were filed.

On March 22, 1915, Hummel filed an answer, verified by his affidavit, in the form set in the interrogatories, in which he alleged in substance that he had not had for four years engaged with and [illegible] to practice as a general collection business in the [illegible] counties. Since that about ten years prior to March, 1915, was either (nonresident plaintiff in the partnership with) and alone with respondent and from which relation commencing about 1905, the

collection and with directions to take all lawful steps to that end; that less than 30 days prior to the institution of the garnishment suit Miller called at respondent's office and directed respondent to bring such suit; that respondent subscribed and swore to the petition for a change of venue on March 16, 1915, and that at that time "he believed the statements contained in said pet tion to be true, but that since then he has discovered that the statement in said petition with reference to the time that knowledge of prejudice on the part of said Judge Stelk first came to him is erroneous in that the date thereof is laid to October 3, 1914, whereas the correct date is on or about January 9, 1915," and that respondent's error arose from the fact that he was inadvertently misled by certain entries in his office docket; that when the petition was filed respondent believed that such proceedings had been had in the garnishment suit as to cause Judge Stelk to believe that respondent was connected with such suit, and that on account of the vacation by said judge, on or about January 9, 1915, of a judgment in the suit of Strelitz v. Walworth to which respondent had had some relations, respondent believed that said judge had become prejudiced against him at that time, and further believed, on account of the foregoing, that the garnishment suit would not receive an impartial trial if tried before said judge, and that for that reason alone respondent caused said petition to be presented to said judge by said attorney Phillips; and that respondent "has at all times regarded and still does regard said Judge Stelk, and the court by him presided over, with due respect, and has never consciously or otherwise been guilty of any disobedience of the rules and orders of said court, nor lacking in proper demeanor toward it." The respondent prayed that, having purged himself of contempt with respect to the matters and things set forth

in the information, the rule might be discharged.

It appears from the stenographic report of the proceedings that the cause came on for hearing before Judge Stelk upon the information, interrogatories and answer, and upon arguments of counsel for the respective parties. No evidence was introduced.

On April 3, 1915, the court entered the order and judgment in question. The court found, inter alia, that the allegation in said petition for a change of venue (that the prejudice of the court first came to the knowledge of respondent on or about October 3, 1914) was incorrect and untrue; that said petition was signed and sworn to by respondent on March 16, 1915, and not by the beneficial plaintiff, and that no sufficient reason or excuse has been assigned why it was not signed and sworn to by the beneficial plaintiff; that said petition fails to allege that the court was prejudiced against the beneficial plaintiff; that the motion for the change of venue was presented in behalf of respondent without any direct request or suggestion from the beneficial plaintiff; that on March 6th and March 15th respondent, by and through his attorney, made notions in said garnishment suit and obtained orders thereon, and that no suggestion was made that respondent believed that the court was prejudiced against respondent; that an inspection of the files and records in the case of Strelitz v. Walworth, mentioned in respondent's answer, reveals the fact that the judgment in said case was not vacated on January 9th, but upon January 16th, 1915; that the action of respondent in presenting the petition for a change of venue, "which onits face was insufficient," without even the request or suggestion of the beneficial plaintiff, and the further action of respondent in endeavoring to induce the court to grant

in the information, the rule might be misleading.

It appears from the stenographic report of the proceedings that the trial judge on for hearing before judge Stalk upon the information, interrogatories and answer, and upon arguments of counsel for the respective parties. No evidence was introduced.

On April 3, 1928, the court entered the order and judgment in question. The court found, inter alia, that the allegation in said petition for a change of venue (that the predecessor of the court first came to the knowledge of respondent on or about October 3, 1924) was incorrect and untrue; that said petition was signed and sworn to by respondent on March 16, 1928, and not by the beneficial plaintiff, and that no sufficient reason or excuse has been assigned why it was not signed and sworn to by the beneficial plaintiff; that said petition fails to allege that the court was prejudiced against the beneficial plaintiff; that the motion for the change of venue was presented in behalf of respondent without any timely request to separate from the beneficial plaintiff; that on March 8th and which is respondent, by and through his attorney, made motions in said garnishment suit and overruled others thereon, and that no suggestion was made that respondent believed that the court was prejudiced against respondent; that an inspection of the files and records in the case of Ingalls v. Palmer, mentioned in respondent's answer, reveals the fact that the judgment in said case was not vacated on January 7th, but upon January 12th, 1928; that the action of respondent in presenting the petition for a change of venue, "which on its face was insufficient," without even the request or suggestion of the beneficial plaintiff, and the further action of respondent in endeavoring to induce the court to grant

such change of venue on a petition not made by the beneficial plaintiff and alleging the prejudice of the court not against said plaintiff but as against the respondent, and the further action of respondent in making the vacation of a judgment in another suit in which he claims he was interested the only basis for his belief of the court's prejudice, without disclosing what evidence of prejudice there was, "all caused unnecessary and unwarranted delay and annoyance in court and interfered with the orderly transaction of the business of the court and also tended to belittle and lessen the dignity of the court, and the apparent freedom indulged in by the respondent in signing and swearing to court pleadings without satisfying himself that the contents thereof are true and correct, if left unnoticed and unpunished, will bring the administration of justice and this court into disrepute and contempt"; that said respondent has failed to show cause why he should not be punished for contempt of court, and that the actions and doings of respondent as recited constitute, and respondent is guilty of, a contempt of this court.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It is well settled that "all courts of record have an inherent power to punish contempts committed *in facie curiae*." (Rapalje on Contempts, sec. 1; *Clark* v. *People* 1 Ill. 266; *Stuart* v. *People*, 4 Ill. 395; *Dahnke* v. *People*, 168 Ill. 102.) In *Stuart* v. *People*, *supra*, p. 405, it is said: "Contempts are either direct such as are offered to the court while sitting as such, and in its presence, or constructive, being offered not in its presence, but tending, by their operation, to obstruct and embarrass or prevent the due administration of justice." And, proceedings for contempt of court are of two classes, viz, "Those which are criminal in their nature, which are sometimes

such change of venue on a petition not made by the defendant plaintiff and alleging the prejudice of the court and jurors; said plaintiff has no equity the respondent, and the further action of respondent in making the rendition of a judgment in another suit in which he claims he was illicitly the only basis for his belief of the court's prejudice, without disclosing what evidence of prejudice there was, "all essential unnecessary and unwarranted delay and expense in court and interfered with the orderly transaction of the business of the court and also tended to belittle and lessen the dignity of the court, and the apparent intention inferred in by the respondent in signing and assenting to court's pleading without satisfying himself that the contents thereof are true and correct, is left unexplained and unjustified, will bring the administration of justice and this court into disrepute and contempt; that said respondent has failed to show cause why he should not be punished for contempt of court, and that the actions and doings of respondent in violated constitutes, and respondent is guilty of, a contempt of this court.

IV. PROCEEDINGS IN THIS COURT NECESSARY TO DETERMINE THE DISPOSITION OF THE CONTEMPT.

It is well settled that "all course of process have an inherent power to punish contempts committed in their presence." (Respite on contempts, see. 2; Ex parte v. Fowler 1 III. 444; Ex parte v. Fowler, 4 III. 448; Ex parte v. Fowler, 1 III. 449.) In Ex parte v. Fowler, supra, p. 449, it is said: "Contempts are either direct such as are offered to the court while sitting, or such, and in its presence, or constructive, being offered not in its presence, but tending, by their consequence, to obstruct and embarrass or prevent the due administration of justice." And, proceedings for contempt of court are of two classes, viz.

called common-law contempts, and those which are intended as purely civil remedies, which ordinarily arise out of the alleged violation of some order entered in the course of a chancery proceeding." (People v. Seymour, 191 Ill. App. 381, 388.) In the instant case the proceedings are criminal in their nature. In O'Brien v. People, 216 Ill. 354, 368, it is said: "When the contempt consists of something done or omitted in the presence of the court tending to impede or interrupt its proceedings or lessen its dignity, or out of its presence in disregard or abuse of its process, the proceeding is punitive or criminal, and the penalty is inflicted by way of punishment for the wrongful act and to vindicate the authority and dignity of the people, as represented by their judicial tribunals." In Welch v. People, 30 Ill. App. 399, 409, it is said: "Blackstone, writing of contempts, having described the preliminary proceedings and then referring to courts of equity, proceeds: 'And thereafter the party in contempt has answered the interrogatories, such his answer may be contradicted and disproved by affidavits of the adverse party; whereas, in the courts of law, the admission of the party to purge himself by oath is more favorable to his liberty, though perhaps not less dangerous to his conscience; for, if he clears himself by his answers, the complaint is totally dismissed.'" In Hake v. People, 230 Ill. 174, 185, it is said: "In cases of common law jurisdiction for contempt the defendant is tried upon his answer made to interrogatories filed. No other evidence is heard. If the answers prove false the remedy is by indictment for perjury, but if the party purges himself of the contempt by his answer he will be discharged." (See, also, Buck v. Buck, 60 Ill. 105, 106; Oster v. People, 192 Ill. 473; Early v. People, 117 Ill. App. 608, 617; Stull v. People, 173 Ill.

App. 512, 514.) In Rapalje on Contempts, sec. 121, it is stated that "on a rule to show cause why a party should not be punished for contempt, the actual intention of the party is material, and if the respondent disavows upon oath any intention of committing a contempt, the rule will be discharged." In People v. Hille, 192 Ill. App. 139, 149, a case involving a criminal contempt, this court said: "Before a person can be found guilty of contempt of court it must clearly appear that in committing the offense complained of he was actuated by some malevolent intention to assail the dignity of the court, or to wilfully and knowingly interfere with its procedure or due administration of justice. There must be a union or joint operation of act and criminal intention. Consequently a person may purge himself of contempt by showing that he acted innocently or through ignorance and without any intention to wrongfully mislead or deceive the court." (See, also, Powers v. People, 114 Ill. App. 323, 327; Ex parte Curtis, 3 Minn. 188.)

After due consideration of the information and the interrogatories and the sworn answer of respondent thereto, we are of the opinion that the judgment of the Municipal Court was not warranted by law and should be reversed. We think that the respondent sufficiently purged himself of the alleged contempt by his answer and that he therein showed that he was not actuated by any malevolent intention or purpose to assail the dignity of the court or to interfere with its procedure or the due administration of justice. And it is difficult for us to perceive how his action in signing and swearing to the petition for the change of venue and causing the same to be presented to the court could have "caused unnecessary and unwarranted delay and annoyance," or could have "interfered with the orderly transaction of the business

of the court" or could have "tended to belittle and lessen the dignity of the court." The petition for the change of venue was insufficient. Respondent was not a party to the cause in which said petition was presented, and the law is that the application for the change of venue must be made by a party to the record and the petition verified by such a party. (Hurd's Stat. Ill. chap. 146, sec. 1; Crowell v. Maughs, 7 Ill. 419, 422; Commercial Ins. Co. v. Mohlman, 48 Ill. 313, 316; McCauley v. People, 88 Ill. 578.) The court could have promptly denied said petition.

The judgment of the Municipal Court is reversed.

REVERSED.

307 - 21703

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

EMANUEL FRIEDLANDER,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

STATEMENT OF THE CASE. Plaintiff in error (defendant) seeks by this writ to reverse a judgment of the Municipal Court wherein he was adjudged guilty of contempt of court and sentenced to confinement in the county jail for 30 days.

There is contained in the transcript of record before us a "Statement of Facts," certified to by the Honorable Sheridan E. Fry, one of the judges of said court, from which and from the common law record the following facts appear:

On September 17, 1914, one Charles Pent was arraigned before Judge Fry on the charge of contributing to the dependency of his child, and on the hearing he was found guilty and sentenced to the House of Correction for one year and ordered to pay for the use of said child the sum of $6 per week, to be released on a recognizance in the sum of $500 signed by him and a surety and approved by the court. On October 2, 1914, Pent was brought from the House of Correction into the court presided over by Judge Fry, and then and there defendant presented himself as a surety on said bond or recognizance and was examined as to his qualifications to act as such surety, and after such examination he was allowed to sign said bond or recognizance as surety and the same was approved by said judge and filed for record, and Pent was released from custody. Thereafter Pent, or others for him, made certain payments of $6 per week and subsequently Pent left the

State of Illinois, and no further payments were made by him or by anyone for him. On February 27, 1915, without any petition or information being filed, the court entered a rule that defendant (who was then present in court) show cause on March 13, 1915, why he should not be adjudged guilty of contempt of court "because on October 2, 1914, he, the said Emanuel Friedlander, having been duly sworn, did then and there depose and swear and testify wilfully, corruptly and falsely as to matters material to his sufficiency as surety upon the recognizance of one Charles Pent, acknowledged and filed on October 2, 1914, in case entitled 'The People, etc., vs. Charles Pent,' now pending in this court." It will be noticed that while it is stated in the order or rule that defendant testified falsely on the occasion mentioned, it is not stated what the particular testimony was which was alleged to be false. On March 13, 1915, defendant was again present in court before Judge Fry, but he did not on that date, or at a subsequent time, file any sworn answer in writing to the rule to show cause, and the hearing on said rule was continued to March 27, 1915, when a partial hearing was had, and the cause was thereafter continued from time to time until July 17, 1915, when the final hearing was had. From said statement of facts it also appears, inter alia, that on March 27, 1915, the testimony of witnesses other than defendant to said rule was heard by the court; that it was disclosed by certain witnesses that defendant, before he signed said recognizance, had been paid the sum of $100 on his representation that he would procure Pent's release from confinement; that it was also disclosed that, when defendant was examined in open court on October 2, 1914, as to his qualifications to act as surety on said recognizance, he stated to said Judge Fry, among other things, that he owned stock in a corporation, of which he was sales-

manager, which stock was worth $10,000, that he owned no real estate, that he was worth over and above all liabilities and exemptions at least $10,000, and that "there were no judgments of record against him unsatisfied of record in the city of Chicago or county of Cook"; that on said hearing on March 27, 1915, certain records of the Municipal Court and other courts of record in Cook County were introduced in evidence showing that on October 2, 1914, there were more than 17 unsatisfied judgments of record in said courts against defendant in favor of various parties; that on said hearing, after the above evidence had been introduced, defendant testified that when he was before Judge Fry on October 2nd "the court asked him what his occupation was and what his financial ability was, and that after he had given this information the court accepted the bond, and that nothing was said to him with reference to judgments pending against him," and that "the bond was taken by the court without a schedule," and defendant "denied absolutely that he had made the statement at the time the bond was signed that there were no judgments against him," and defendant further testified that of said judgments appearing of record against him "the major part were paid though not satisfied of record." On the date of the final hearing, July 17, 1915, after the court had overruled defendant's motion that said rule be discharged and the proceedings dismissed, the court entered a final order, finding him "guilty of contempt on rule to show cause" and adjudging him guilty of contempt on said finding and sentencing him to the county jail as aforesaid. In said order the court also found:

> "On October 2, 1914, said Emanuel Friedlander, the defendant in this cause, was present in open court, and while this court was in open session said defendant then and there offered to act as surety for the appearance before

this court of one Charles Pent, said Charles Pent then and there being the defendant in this court; and thereupon it became material to the acceptance of said Emanuel Friedlander, as surety aforesaid, to examine and inquire of said Emanuel Friedlander concerning his qualifications to act as surety aforesaid and the sufficiency thereof; and the said Emanuel Friedlander, being so inquired of and examined by the court as aforesaid, did then and there make certain misrepresentations to the court and give the court to understand that no judgments were then and there outstanding against him, the said Emanuel Friedlander, whereas, in truth and in fact, as the said Emanuel Friedlander well knew, certain judgments were then and there outstanding against him."

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It appears that the court in this case, on a rule to show cause, etc., adjudged defendant guilty of contempt, because the court found, from the testimony of witnesses other than defendant and from certain records of the Municipal and other courts, that on October 2, 1914, when defendant was being interrogated by the court as to his qualifications to act as surety on Pent's recognizance, defendant made certain "misrepresentations" and "gave the court to understand" that no judgments were then outstanding against defendant, whereas, in truth and in fact and as he well knew, there were certain judgments then outstanding against him.

"Proceedings for contempt of court are of two classes: Those which are criminal in their nature, which are sometimes called common law contempts, and those which are intended as purely civil remedies, which ordinarily arise out of the alleged violation of some order entered in the course of a chancery proceeding." (People v. Seymour, 191 Ill. App. 381, 388.) "When the contempt consists of something done or omitted in the presence of the court tending to impede or interrupt its proceedings or lessen its dignity, or out of its presence in disregard or abuse of its process, the proceeding is punitive or criminal, and the penalty is inflicted by

way of punishment for the wrongful act and to vindicate the authority and dignity of the people, as represented by their judicial tribunals. In such cases the application for attachment may be made in the original cause, yet the contempt proceeding will be a distinct case criminal in its nature." (O'Brien v. People, 216 Ill. 354, 363.) In the present case the proceedings instituted against defendant are criminal in their nature. In such proceedings "it is necessary that the respondent be apprised with reasonable certainty, by affidavit, information or rule to show cause, of the nature of the charge against him and of the facts upon which the alleged contempt is predicated, and it is also requisite that he shall have a reasonable opportunity to answer the charge by a written answer under oath." (People v. Seymour, supra, p. 393.) In the present case the substance of the charge made in the rule to show cause is that on October 2, 1914, the defendant testified falsely as to matters material to his sufficiency as surety on the recognizance mentioned. If, as a matter of fact, defendant did at that time testify falsely before Judge Fry, it is quite apparent that said judge did not then know that he had so testified in such matters, for the judge allowed him to sign as surety and approved the recognizance. In the present case, also, it does not appear that the defendant was apprised by the rule to show cause, or in any other manner before the hearing, what the particular statements or testimony, alleged to be false, given by him on October 2nd were; nor does it appear that the defendant filed any sworn answer in writing to said rule. Usually, where the contempt proceedings are criminal in their nature, the defendant is tried upon his sworn answer made to the information or affidavit or interrogatories filed; but he may answer the charge orally, under oath, in open court, if he chooses. (People v. Hille, 192 Ill. App. 139, 148; Stull

way of punishment for the wrongful act and in the hands of authority and dignity of the judge, as reported by their judicial authority. In such cases the application for [illegible] adjudgment may be made in the criminal court, and the [illegible] proceeding will be a distinct and separate [illegible] (Ex parte v. Jones, 108 III. 548, 550.) In the [illegible] the proceedings instituted against [illegible] their nature. In such proceedings it is necessary that the response be supported with reasonable certainty, by [illegible] information or rule to show cause, of the nature of the charge against him and of the facts upon which the alleged contempt is predicated, and it is also requisite that he shall have a reasonable opportunity to answer the charge by a written answer [illegible] v. [illegible], [illegible]).

Present case the substance of the charge made in the rule to show cause in this on October 2, 1882, the defendant [illegible] fraudulently as to produce material to his [illegible] [illegible] the recognizance mentioned. It, in a matter of [illegible] [illegible] at that time totally fraudulent [illegible] it is [illegible] apparent that said judge did not then [illegible] [illegible] satisfied in such matters, for the judge [illegible] as surely was [illegible] the recognizance. In the present case, also, it does not appear that the [illegible] rule to show cause, or in any other manner [illegible] [illegible] the particular statements or testimony, [illegible] given by him on October 2nd were; nor does it [illegible] that the defendant filed any proper answer in writing to said rule.

Finally, [illegible] the contempt [illegible] nature, the defendant is tried upon the [illegible] the information or affidavit or interrogatories filed; but he may answer the charge orally, unless [illegible], in open court, if he [illegible] (People v. Tuthill, 121 Ill. 101, 107; 1887; [illegible]

v. People, 173 Ill. App. 512, 514.) "If, by his sworn answer, he specifically denies the facts upon which the charge is founded, or if he sets up other facts which, if true, are sufficient to acquit him of the charge, then he must be discharged, for the reason that his answer in such case presents an issue of fact which can not be tried by the court in a proceeding of this character." (People v. Seymour, supra, p. 393; Welch v. People, 30 Ill. App. 397, 410; Hake v. People, 230 Ill. 174, 186.) "Opposing testimony will not be heard." (Crook v. People, 16 Ill. 534, 537.) And, if the answers prove false, "the remedy is by indictment for perjury." (Hake v. People, supra; Stull v. People, supra.) On the hearing of the present case it was disclosed, by the testimony of witnesses other than defendant, that on October 2, 1914, defendant stated inter alia to Judge Fry that "there were no judgments of record against him unsatisfied of record in the city of Chicago or county of Cook," and that, by the introduction in evidence of certain records of the Municipal Court and other courts of record in Cook County, at that time (October 2nd) there were more than 17 unsatisfied judgments of record in said courts against defendant in favor of various parties. The defendant then orally stated under oath that when he was interrogated by Judge Fry on October 2nd "nothing was said to him with reference to judgments pending against him" and that "the bond was taken by the court without a schedule," and that he orally "denied absolutely that he had made the statement at the time the bond was signed that there were no judgments against him." We are of the opinion, under the facts and under the authorities above cited, that when the defendant gave the above testimony in open court, that testimony should have been given the same force and effect as if he had made the same statements and the same

v. People, 172 Ill. App. 384, 386.) "If, by the common
answer, he specifically denies the fact on which the
charge is founded, or is be made up about [illegible], it
does, are sufficient to [illegible] the [illegible],
must be taken [illegible]. For the person [illegible]
even presents an issue of fact or [illegible] by the
court in a proceeding of this character." [illegible] v. [illegible],
supra, p. 496; People v. [illegible], 97 Ill. App. [illegible]; People v.
Mangle, 350 Ill. 174, 182.) "Generally [illegible] and
[illegible]." (People v. [illegible], 32 Ill. App. 577.) [illegible]
[illegible] "[illegible] to be [illegible]."
(People v. [illegible], supra; People v. [illegible], supra.) In the
hearing of the present case it was [illegible], [illegible]
of witnesses other than defendant, [illegible] (People
[illegible] v. People, 100 Ill. 494, 496.) [illegible]
judgments of [illegible] [illegible]
city of Chicago or county of Cook," and that, [illegible]
[illegible] of [illegible]
and other [illegible] in [illegible]
[illegible]
of success in such [illegible]
[illegible]. "The [illegible] when [illegible]
[illegible] be not interrupted by [illegible]
[illegible] said to [illegible] to [illegible]
[illegible]
[illegible]" and that "the [illegible] by the [illegible]
[illegible]," and that [illegible]
[illegible] made the [illegible] of the [illegible]
[illegible] no [illegible]
[illegible] the facts and [illegible]
when the defendant gave the [illegible]
that testimony should have [illegible]
[illegible]

denial in a written answer under oath to the rule to show cause, that by such testimony the defendant sufficiently purged himself of the charge, and that the court erred in not granting defendant's motion that the rule be discharged and the proceedings be dismissed. In this connection reference is also made to the case of People v. Stone, 181 Ill. App. 475.

The judgment of the Municipal Court is reversed.

REVERSED.

22471

CHESTER C. MOE, et al.,
Appellees,

vs.

ROYAL LIFE INSURANCE COMPANY,
a corporation,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

199 I.A. 305

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT

This is the appeal of the Royal Life Insurance Company, a corporation, from an interlocutory order of the Superior Court of Cook County appointing a receiver of its property without notice.

The bill was filed on February 28, 1916, by Chester C. Moe, Catharine Davis Moe, Harold Rossiter, Mabel Oehlsen, C. J. Krysinski, Julius Shieffert, Adolph Pearson and Hildon Ohlson, complainants, as "stockholders in Royal Life Insurance Company, a corporation, on behalf of themselves and all other stockholders in said corporation similarly situated." The defendants named in the bill were the corporation, and Alfred Clover, Oscar W. Steck, Earl A. Barker, J. W. Singleton and A. F. Gibbs, directors and officers of the corporation, and Rufus W. Potts, as Insurance Superintendent of the State of Illinois. The bill was sworn to by William McKinley, the solicitor for the complainants. It is recited in the court's order, entered the same day the bill was filed, that the cause came on to be heard upon the verified bill of complaint of said stockholders and the affidavit of J. M. Pederson, presented in support thereof and filed, and that it appeared to the court that it was necessary, in order to preserve the assets and property of said corporation,

that a receiver, pendente lite, be forthwith and without notice appointed. It is thereupon ordered, in substance, that Mark F. Bransfield of Chicago is appointed receiver, until the further order of the court, with the usual rights and powers of receivers in chancery to receive and take and hold possession of all the property and assets of the corporation, real and personal and wheresoever situate, including all books, records, files, etc., and including all moneys, bonds, stocks and securities "except such as may have heretofore been deposited with or may now be in the possession of the Insurance Superintendent of the State of Illinois," and to hold the same "to the exclusion of all other persons and all directors or other officers" of said corporation, and "to receive and collect premiums and conduct the business other than to accept applications or issue policies," upon his filing bond with sufficienct surety in the sum of $25,000, conditioned upon the faithful performance of his duties as such receiver, and provided that complainants shall first give bond in the sum of $5,000, with sufficient surety, payable to said corporation, conditioned upon the payment of all damages, including attorney's fees, sustained by reason of the appointment and acts of the receiver in case his appointment is revoked and set aside. On the same day the two bonds mentioned in the order were presented and approved by the court and filed. On March 1, 1916, all of the defendants, except Rufus M. Potts, Insurance Superintendent, entered their appearance, filed a demurrer to the bill, and moved the court to vacate the order appointing the receiver, and on March 2nd the court, after hearing the arguments of counsel, denied the motion.

The corporation subsequently and in apt time perfected this appeal from the order of the court, entered

February 28th, appointing the receiver. This appeal was properly taken from that order. (In re Eichenbaum Plumbing Co., 77 Ill. App. 363; Sec. 123 Practice Act; Iroquois Furnace Co. v. Kimbark, 85 Ill. App. 339, 405; Henderson v. Flanagan, 75 Ill. App. 283, 293.)

While it is alleged in the bill that the complainants are stockholders in the corporation, it is not stated what the amount of their stock-holdings is, either individually or collectively, or when they or any of them acquired their stock. The bill alleges in substance that sometime prior to April 30, 1914, the defendants Alfred Clover, Barker, Singleton and Gibbs and certain other individuals filed with the Insurance Superintendent of Illinois a declaration signed by them as corporators, in pursuance of an act of the legislature of Illinois, entitled "An Act to organize and regulate the business of life insurance," approved March 26, 1869, and other acts amendatory thereof; that thereafter they received from said Superintendent a certified copy of said declaration and proceeded to open, and did open, books of subscription to the capital stock of said Royal Life Insurance Company, and proceeded to collect the capital to effect a complete organization; that "thereafter said corporation deposited with said Insurance Superintendent the amount of said capital, to-wit, the sum of $100,000," and that said Superintendent issued to said corporators a certificate of deposit, which with said copy of said declaration was, on April 30, 1914, recorded with the recorder of deeds of Cook County; and that thereupon said corporation commenced business and issued policies.

The bill further alleges that the said corporation was organized by said Alfred Clover and his said associates pursuant to a "plan and conspiracy," led by said Clover and participated in by him and his associates, "for the purpose of enabling them to sell to your orators, and to other stock-

holders and to the public, large amounts of stock at prices two, three, four and five times the par value thereof, to thereby collect great sums of money which they intended to and did thereafter use to pay themselves large and extravagant sums as commissions, salaries and expenses upon the sale of stock and upon the sale and writing of insurance by such corporation, and to misappropriate and convert to their own use from any remaining proceeds large sums of money"; that pursuant to said conspiracy contracts were made between Clover, individually, and Clover and his associates as directors and officers, in the name of the corporation, "for the payment of excessive, extravagant and fraudulent commission and expenses" to said Clover upon the sale of stock and insurance; that said Clover, his associates and other persons under his control and direction, have "unlawfully and unjustly" received and taken from the corporation "large sums" of money; that the corporation has collected upon stock sales more than $500,000, and upon stock sales and insurance premiums more than $750,000; that the corporation has paid out $625,000, leaving in its hands at the end of the year 1915 less than $120,000 in assets; that of said $625,000 less than $45,000 has been paid for claims, and more than $580,000 has been "expended, wasted and misappropriated"; and that, as against less than $120,000 remaining assets, the reserves amount to about $70,000, and other admitted liabilities to about $10,000, leaving less than $40,000 of assets. It is to be noted that the above allegations are general in their character. While the purpose of the "plan and conspiracy" in the organization of the corporation is set forth, the facts relating thereto are not alleged. While it is charged that "contracts" were made between Clover and the directors and officers of the corporation in the name of the corporation for the payment to Clover of "excessive, extravagant and fraudulent commissions and expenses," the contracts are not

set forth and it is not shown wherein the payments are excessive, unlawful or fraudulent. While it is charged that more than $580,000 has been "expended, wasted and misappropriated," it is not shown what sums were disbursed for necessary and proper expenses and what sums were wasted or misappropriated.

The bill further alleges that prior to the complete organization of the corporation Clover, for the purpose of selling stock, issued prospectuses, advertisements and literature "containing false and misleading statements" as to the profits made by holders of stocks in life insurance companies, and that he, by said false and misleading statements, procured the proxies of those purchasing stock in said corporation authorizing him or other of the corporators to vote their stock at the stockholders' meeting, and that by means of "said false and fraudulent plan" he was enabled to and did vote the stock for himself and others in his interest to fill the offices of directors of said corporation; and that after the organization of the corporation he, by false and misleading statements, controlled the actions and voting power of the stockholders by proxy at all stockholders' meetings for his own interest and profit. Nowhere in the bill are said prospectuses, etc., set forth, nor is it stated what the statements alleged to be false and misleading were.

The bill further alleges that Clover, by means of said false and misleading statements and advertisements, procured the election of himself and defendants Steck, Barker, Singleton and Gibbs as directors of the corporation, that he dominated their actions and votes as such directors, and that, in order to more effectually hold control of the management of the corporation and to personally profit thereby, he procured the election of himself as President, Steck and Barker as Vice-Presidents, Singleton as Secretary and Gibbs as Medical

ack forth and it is not clear whether the [illegible] are necessary, natural or fraudulent. While it is clearer that more than [illegible] has been "capital", "stock and bonds" appropriated, it is not clear that such [illegible] are necessary and proper expenses and that some are [illegible] misappropriations.

The bill further alleges that [illegible] organization of the corporation [illegible], for the purpose of selling [illegible] [illegible] [illegible] [illegible] the profits made by means of leases in life insurance companies, and that he, by said [illegible] and misleading statements, procured the profits of those promoting stock in the corporation [illegible] [illegible] authorizing him or other of the incorporators to sell their stock at [illegible] [illegible], and that in order to "sell fakes and fraudulent plans" by the method in and its vote the stock for himself and others in his [illegible] to fill the offices of directors of said corporation; and that after the organization of the corporation by, [illegible] and wrongful misstatements, controlled the voting and voting power of its stockholders by proxy to all shareholders residing for the own interest and profit. [illegible] in the bill are [illegible] [illegible], etc., not true, nor is it [illegible] that the statements alleged to be false and misleading were.

The bill further alleges that [illegible], by means of said false and misleading statements [illegible] [illegible] caused the election of himself and [illegible] [illegible], [illegible] [illegible] and [illegible] as [illegible] of the corporation, and by [illegible] [illegible] [illegible] [illegible] [illegible], and that, in order to more effectually [illegible] control of the management of the corporation and to personally profit thereby, he procured the [illegible] of minutes to [illegible], [illegible] [illegible]

Field Supervisor; that since said time he, by "false and fraudulent means and through the procurement and use of proxies," still retains his said control and domination in the affairs and policies of the corporation; that at several stockholders' meetings he has repeatedly refused to permit a "committee" of the stockholders to examine into the manner of procurement of said proxies, their legality and genuineness, or to determine the number of shares of stock represented and voting at said meetings; that the stock of said corporation consisted of 10,000 shares of the par value of $10 per share and was sold by the corporation at various prices, ranging from $20 to $50 per share; that the total sum received from the sales of said stock was in excess of $270,000; that in order to effectuate said sales and to profit thereby, Clover caused "a contract" to be entered into between himself and the corporators whereby he was to receive "grossly excessive and exorbitant sums of money" in the promotion of the corporation and the sale of the stock, and that subsequently other "similar contracts" were entered into between himself and the directors of the corporation; that in the organization of the corporation and in the promotion of stock sales Clover made "false, fraudulent and misleading statements," and issued and circulated "advertisements," whereby he induced divers persons in Illinois and other states to invest in the stock of said corporation, and from which investments he profited personally to the extent of "many thousands of dollars," and which investments he caused to be made on the strength of "false representations and promises," and said investors were "deceived and fraudulently misled, wronged and injured"; that after the organization of the corporation Clover installed a system of accounts designed and intended to deceive and conceal "false and fraudulent practices" by him then carried out for his personal advantage and profit and whereby he did so profit to the extent of large sums of

Field importance that since such time as Mr. Colin and Trowbridge's means and through the personal influence of a premier," still retains his which centered and dominated in the affairs and policies of the company since; that in personal stockholders' meetings he has repeatedly stressed the points: "commitment" of the stockholders to somehow into the manner of management of milk prices, their liquidity and generally, or to determine the number or manner of stock dividends and voting in said meetings; that the stock of said corporation amounted of 20,000 shares at the a value of $20 per share and was held by the corporation in several ways, namely from 200 to 300 per shares; that the total was deducted from the sales of milk stock was in excess of $400,000; that in order to effectuate milk sales and to profit thereby, Dawson required "a commitment" to be entered into between himself and the corporation whereby he was to receive "growing responsibility and increasing amount of money" in the production of the corporation and in sale of the stock, and that accordingly either "labelled employees" were entered into between himself and the directors of the corporation that in the organization of the corporation and in the promotion of stock sales Dawson made "false, misleading and misleading statements," and issued and distributed "advertisements," whereby he induced divers persons in Illinois and other states to invest in the stock of said corporation, and from time to time investments he profited personally to the extent of "thousands of dollars," and which investments he caused to be made on the strength of "false representations and promises," and said investors were deceived and "wrongfully misled, cheated and injured"; that after the organization of the corporation Dawson instituted a system of accounts designed and intended to deceive and conceal "illegal and improper practices" by him then carried out for his personal advantage and profit and whereby he did so profit to the extent of large sums of

money; and that prior to May 1, 1915, Clover "caused to be withheld" from examiners of said Insurance Department "certain checks for disbursements of medical fees and other items" in order to deceive said Department as to the actual and true financial condition of the corporation. It will be noticed that many of the allegations in this paragraph contained state conclusions rather than facts. For aught that appears to the contrary anywhere in the bill from facts alleged, the election of Clover and the other directors was lawfully accomplished by a majority vote of the stockholders, in person or by proxy, in accordance with the statute, and their election as officers also lawfully accomplished in accordance with the by-laws, and that the general control and supervision of the corporation was originally vested and has remained vested in the president, Clover, through the action of the holders of the majority of the stock, voting either in person or by proxy as was their right. It does not appear what were the "false and fraudulent" means which it is alleged were used by Clover to procure proxies, what the "contract" was which it is alleged he made with the corporators and what the "similar contracts" were which it is alleged he made with the directors, whether or not said contracts are still in force, or for what period of time they were to remain in force, or what were the "false, fraudulent and misleading statements" which it is alleged he made, or the "advertisements" which it is alleged he issued and circulated, in his endeavor to induce subscriptions and payments for stock at prices above the par value, wherein said subscribers and stockholders were "deceived and fraudulently misled."

The bill further alleges that Clover, in order to "divert suspicion" as to the "grossly excessive profits" received by him, arranged with the other directors that he should receive a salary of $99.99 per month for his services as president of the corporation, that in his statements to

prospective purchasers of stock and to policy holders he represented that his salary and the moderate salaries paid to other officers was indicate of a policy of keeping the expenses down and thereby paying large dividends, and that as a result of his above mentioned "excessive contracts" for commissions on the sale of stock and on business written, he in fact received an income of not less than $13,000 per year; and that immediately after the receipt from said Insurance Department of the authority to open books of subscription to the capital stock, Clover incurred "grossly excessive expense" for rental and maintenance of offices in divers cities to assist in the sale of stock in order that he might personally profit thereby. There is no allegation in the bill as to amount of such excessive expense. Neither is there any allegation relative to the duration of such "excessive contracts" nor that said contracts were in violation of section 208 1 of chapter 73 of Hurd's Statutes of 1915, [(Cont'd) wherein it is provided in substance that no life insurance company shall make any agreement with any of its officers, whereby it agrees that such officer for services rendered or to be rendered shall receive any salary, compensation or emolument that will extend beyond a period of three years from the date of such agreement, and wherein it is also provided that no officer or director, who is paid a salary for his services of more than $100 per month, shall receive any other compensation or emolument.]

The bill further alleges that Clover and the directors in violation of the laws of the State of Wisconsin, sold stock of the corporation in that state, whereby the corporation is "subject to actions" by the purchasers for the recovery of the amounts paid therefor. There is no allegation that any such actions have been begun or threatened, or that complainants have suffered any injury by such sales. The bill further alleges that at a stockholders' meeting Clover, as president,

refused to entertain the motion of "certain stockholders" that a "committee" be appointed to audit the books of the corporation. There is no allegation that proper books of account were not kept or that complainants did not have access thereto, or that the annual statements required by statute to be filed were untrue. The bill further alleges that "heavy" losses have been sustained and more losses will be sustained, by the issuance of "sub-standard" policies to individuals after their applications had been rejected by the medical directors.

The bill further alleges in substance that, "by means of said fraudulent acts" on the part of Clover and the other officers and of "said frauds" upon the policyholders and stockholders, the surplus of $170,000 was expended and the capital of the company became impaired; that Clover, on July 14, 1914, convened a meeting of the directors, at which meeting they passed a resolution suggesting a change of the object of the corporation so as to insure persons against bodily injury, disability or death resulting from accidents (pursuant to a certain act of the legislature of the State of Illinois whereby life insurance companies can also engage under certain conditions in the business of accident and health insurance) and suggesting an increase in the capital stock from $100,000 to $300,000 divided into 30,000 shares of the par value of $10 per share; that at a subsequent meeting of the stockholders such changes were duly authorized and the required declaration and certificate were duly filed with the Insurance Superintendent and Recorder of Deeds of said Cook County, respectively; that under said act it is required that a life insurance company, desiring also to engage in the business of accident and health insurance, shall deposit with the Insurance Superintendent at least $100,000, in addition to the like sum previously deposited on account of its life insurance business, which sums shall be held in trust

by such Superintendent for the benefit of policyholders and for other purposes prescribed; that upon the filing of said declaration Clover, in order to induce purchases of the increased stock and obtain the necessary funds to make such additional deposit, advertised the purpose of the company in making such changes, but that his real purpose was to deceive prospective investors in said increased stock in order that he might personally profit by the sales of said stock; that he induced divers persons to invest in such stock "by misleading statements and false advertisements" relative to the proposed additional business and to the condition of the company; that he sold over 7,400 shares of such stock, of the par value of $10 per share, at the price of $30 per share and upwards, and for which there was collected more than $220,000; that said 7,400 shares were purchased by said investors pursuant to said declaration filed and because of the representations made, and that said sum of more than $220,000 was received by the corporation as a trust fund in order to provide the necessary amount required to be deposited with said Insurance Superintendent before the company should engage in said accident and health business; that at the time of filing said declaration and certificate the capital stock of the company, as originally organized, was greatly impaired; that from May 1, 1914, to December 31, 1914, because of "mismanagement" of the company's affairs and the payment of said "large commissions" to Clover on the sale of stock and the writing of policies, the capital stock of the company became impaired to the extent of over $50,000; that during the year 1915, Clover and his associates continued to "mismanage" the affairs of the company and to "profit" by the sales of stock and the issuance of policies, so that "the capital of said corporation (including the moneys paid to it by stockholders on the representation that the same was to be used for the purpose of providing said fund to be

deposited with said Insurance Superintendent amounting in the aggregate to over $172,000) was impaired in the sum of over $135,000"; that Clover and his associates have never set apart the moneys collected from sales of said increased stock to be used as said deposit with the Insurance Superintendent, and that the same were misapplied by the corporation and by Clover and his associates for his own profit and to pay liabilities and charges upon the corporation as originally organized and to supply "a portion" of the deficiency in the capital stock; that from the aggregate sales of the original stock and the sales of "the portion" of the increased stock, the corporation has received over $500,000, and that "of said amount, after provision for the payment of the admitted liabilities including the reserves on policies and other proper claims, the corporation has a balance of assets of less than $40,000; that during the year 1914, owing to "extravagant and wasteful operation," the gross loss in surplus amounted to over $136,000, and during the year 1915 to over $160,000; that on December 31, 1915, "the assets remaining, after providing for the admitted liabilities and for the reserves on outstanding policies, amounted to less than $40,000"; that by reason of "false and fraudulent representations" made in the sale of said increased stock the company is "liable" to the purchasers thereof "for the entire purchase price paid therefor," amounting to more than $216,000, which sum is in addition to all other liabilities, and that said liability of $216,000 with said other liabilities make the company absolutely insolvent, in that the total liabilities on December 31, 1915, including said liability of $216,000, amount to "more than $296,000, as against assets, including all securities deposited with said Insurance Superintendent, not exceeding $120,000": that Clover and the other directors now propose to provide for a further additional issue of stock, for the purpose of securing for their personal

benefit "large sums for commissions and promotion expenses" on the sale of such additional stock and of procuring money for "continued extravagant and wasteful expenditures" in the conduct of the business of the company, that the sale and issue of any such additional stock, upon such "false and fraudulent representations" as have been made in the sale of the previous issues, will result in greatly increasing the liabilities of the company for their "fraudulent" acts and in wholly destroying the interest and property in the company of complainants; that Clover and his associates "are now endeavoring to sell the remaining $25,000 of the capital stock" at prices ranging from $30 to $50 per share; that "it is essential to the welfare of the company" that the defendants Clover, Steck, Barker, Singleton and Gibbs "be removed as directors of said corporation," that they "threaten the company with financial ruin," and that they "have entered into an unlawful conspiracy" to deprive the stockholders other than themselves of their rights as stockholders by "fraudulently and unlawfully exploiting the corporation and converting its funds and assets to their own use"; that on account of the foregoing acts and doings of Clover and the other directors, the interests of complainants, other stockholders, policyholders and the public have been "greatly and irreparably injured," and their several interests will continue to be "very seriously jeopardized"; that, therefore, it is "imperatively necessary" that the remaining assets of the corporation, and the interests of complainants, other stockholders, policyholders and the public, should be conserved and kept intact, and that "a receiver be appointed to conserve said assets, as far as the same may now be possible, and to prevent the further depletion and fraudulent conversion of the same." It will again be observed that in this paragraph many conclusions are stated rather than facts from which the conclusion may be reached; that for aught that

appears to the contrary the increase of the capital stock from $100,000 to $200,000, for the purpose of engaging in accident and health insurance business, was lawfully accomplished by vote of the stockholders in meeting assembled, and that said increase was assented to by complainants, there being no allegations as to whether complainants are owners of shares of the original or of the increased stock; that it is not shown what the "misleading statements and false advertisements" were by which Clover induced various individuals to purchase about three-fourths of the number of shares of said increased stock, of which stock one-fourth of the shares are as yet unsold; that certain allegations of the general financial conditions of the company at the end of the year 1915, are somewhat conflicting with other allegations; that it is not shown what the "admitted liabilities" are, or what are the amounts of the "reserves on policies"; that the alleged liability of the company to pay back $216,000 to the purchasers of the increased stock, because of alleged "false and fraudulent" representations made prior to the sale, which representations are not set forth, is to say the least doubtful; that, not taking into consideration this alleged liability, the allegations do not disclose that the company is in an insolvent condition; and that it is not shown that the proposed additional increase of stock has been authorized by the stockholders and that, hence, the alleged danger of liabilities arising from the sale of such additional stock, not yet in existence or even authorized, is not imminent.

It is alleged in substance in the affidavit of J. M. Pedersen that he is by occupation a bookkeeper and accountant; that he entered the employ of the defendant company on January 7, 1915, and continued in that employment as bookkeeper until May 1, 1915; that during the period of his employment Clover drew out "large sums" of money from the treasury of the com-

pany at various times which he first directed to be charged to his personal account and afterwards to sundry items without vouchers; that the method of transacting business was "loose and unbusinesslike"; that large numbers of checks were made out for "medicalnfees and other matters" and the checks placed in the vault, and that an examination of the company's affairs was made by the Insurance Department and these various and sundry items were "concealed" from said department under Clover's direction; that at one time said department directed that a certain method of keeping the accounts be installed and that subsequently Clover directed affiant to disregard said directions and to retain the old system; that at another time a firm of certified public accountants was employed by the company to install a system of bookkeeping and that said firm's suggestions thereon were wholly disregarded; that the selling of stock of the company was wholly under the direction of Clover, that at some times Clover reported to affiant the net amount and at other times the gross amount received from such sales, but that his reports did not show to whom commissions were paid on the sale of a majority of the stock or the amounts of the commissions; that at the time affiant left the employ of the company the books in many instances did not show to whom commissions were paid or the amounts thereof, that according to the books Clover's salary appeared to be $99.99 per month, but that he drew large sums of money weekly and claimed that he had a contract with the company whereby he was to receive one per cent. (1%) of the business of the company, which amounted to a large sum of money, and that in affiant's opinion no complete audit of the books could be made whereby the Insurance Superintendent, the public, the policyholders or the stockholders could obtain sufficient information as to the actual financial condition of the company. √

One of the grounds urged for a reversal is that the interlocutory order appointing the receiver was entered without notice to the defendant company. In High on Receivers, 4th Ed., section 111, it is stated: "Courts of equity are exceedingly averse to the exercise of their extraordinary jurisdiction by the appointment of receivers upon ex parte applications, and this practice is never tolerated except in cases of the gravest emergency, demanding the immediate interference of the court for the prevention of irreparable injury. * * And it may be stated as the settled practice, both in England and in America, to require the moving party to give due notice of the application to defendant, over whose effects he seeks the appointment of a receiver, in order that he may have an opportunity of being heard in defense, and that his property may not be summarily wrested from him upon an ex parte application." The author, however, further says (Sec. 112): "But where the propriety of the action of the court in appointing a receiver without notice has been considered by the court upon a motion to discharge the receiver, and the court has sustained the original order by refusing to discharge him, the want of notice of the appointment is thereby cured." (See, also, Bristow v. Home Building Co., 91 Va. 18, 24; Hancock v. American Bonding Co., 86 Ill. App. 630, 633; Williams v. Chicago Exhibition Co., 188 Ill. 19, 27.) In the present case it appears that after the court had appointed the receiver without notice, the defendant company entered its appearance and filed a demurrer to the bill and moved the court to vacate its order of appointment, and that the court, after hearing arguments of counsel, denied the motion. Under the circumstances we do not think we would be warranted in reversing the order of appointment upon the sole ground of lack of notice that application for the appointment of a receiver would be made.

The principal point urged for a reversal of the interlocutory order is that the entry of the same was not warranted under the allegations of the bill and the accompanying affidavit of J. M. Pedersen.

We think it is apparent that the bill is not based on section 25 of the Corporation Act. The dissolution of the corporation is not prayed for. The bill is filed by several minority stockholders of the corporation and the prayer is that Clover and the other directors and officers make a full accounting, that certain contracts entered into by and between some of said directors and officers and the company be held to be void, that the present directors and officers be removed from their respective offices, and that a receiver be appointed, pendente lite, without notice. The allegations of the bill do not disclose that the company is insolvent. Indeed, counsel for appelles in their printed argument here filed admit that the company is solvent if the possible liability, as alleged, to the purchasers of the increased stock is not taken into consideration. The appointment of the receiver, pendente lite, if justifiable, must be justified under the general powers inherent in a court of equity.

In 23 Am. & Eng. Encyc. of Law (2nd Ed.) at page 1002, it is said: "The appointment of a receiver is a remedy of purely equitable origin, having originated in the English Court of Chancery, where it has been employed from a very early time. It is, indeed, one of the oldest equitable remedies, and grows out of the inherent power of a court of equity to afford relief where the remedies to be obtained in the courts of ordinary jurisdiction are inadequate." It is further said (p. 1004): "The power to appoint a receiver, pendente lite, with power, merely, to care for and preserve the property committed to his charge, is one incidental to the jurisdiction of a court of equity. It does not and never

did depend upon statute, nor upon the character of the parties, whether individuals or corporations, nor upon the nature of the property." It is further said (p. 1023): "The rule generally recognized is that a corporation will be placed in the hands of a receiver for the misconduct of its officers or directors only when necessary to preserve the property or rights of creditors or stockholders. The mere misconduct of officers of a corporation is not sufficient ground for the appointment of a receiver, as a court of equity may forbid the misconduct or remove the officer from his position." In 1 Morawetz on Private Corporations (2nd Ed.) section 381, it it said: "A court of equity will grant all relief to a shareholder which the nature of his case may require. But it has always been a settled principle that no interference with the management of a corporation can be justified, unless such interference be absolutely necessary to the attainment of justice. The reason of this rule is obvious. The officers of a corporation are generally elected by vote of the shareholders. Every shareholder has a voice in their appointment. * * If an officer is guilty of a breach of duty, he may in many cases be removed by act of the corporation; but no minority of the shareholders have any authority to restrain his action, or remove him and appoint another officer in his place. Nor can a court of chancery interfere at the suit of a portion of the shareholders and remove an offending officer, or even enjoin him generally from acting for the corporation, unless this be essential to the protection of the corporate rights. ** The appointment of a receiver or manager of a solvent corporation must therefore be considered a strong remedy, which can be justified only in a strong case." Again, in the same book, at section 545, it is said: "It would seem, therefore, that a court of equity may remove the directors of a corporation from office at the suit of the corporation or a shareholder acting on its

[illegible] beyond your [illegible], and upon the [illegible] of the [illegible], whether individuals or corporations, are upon the [illegible] of the [illegible]." It is further held [illegible]: "The rule generally recognized is that a corporation will be placed in the hands of a receiver for the mismanagement of its officers or directors only when necessary to preserve the property or rights of creditors or stockholders. The mere mismanagement of officers of a corporation is not sufficient ground for the appointment of a receiver, so a court of equity may refuse the appointment of a receiver upon the ground that the mismanagement of a private corporation (sec. 6.) section 763, it is said: "A court of equity will grant all relief to a mismanaged corporation the nature of the case may require. But it has always been [illegible] of a corporation can be qualified, unless such interference is absolutely necessary to the maintenance of its life. The reason of this rule is obvious. The affairs of a corporation are generally elected by vote of the shareholders. Every shareholder has a voice in their appointment. [illegible] is guilty of a breach of duty, it may be many cases a remedy by act of the corporation; but no authority of the shareholders have any authority to relinquish his office, or prevent him from appoint another officer in his place. The [illegible] of chancery interfere at the suit of a portion of the shareholders and remove an officer-holder officer, or even enjoin his [illegible] from acting for the corporation, unless this is essential to the protection of the corporate rights. [illegible] of a receiver or manager of a [illegible] corporation must therefore be considered a strong remedy which can be [illegible] only in a [illegible] case." Again, in the same book, of writing [illegible] it is said: "It would seem, therefore, that a court of equity may remove the officers of a corporation for [illegible]

behalf, if for any reason the directors are incapable or unsuitable to perform the trust they have undertaken. It should be observed, that the courts will not remove the directors from office, or restrain them generally from representing the corporation, except in a case of absolute necessity. * * If the powers of the directors are revoked in pursuance of an order of court, a receiver should be appointed until a meeting can be held and new directors elected by the majority." In 5 Thompson on Corporations (2nd Ed.) section 6334, it is said: "Courts hesitate to throw corporations into the hands of receivers, and proceed with extreme caution in the appointment of receivers, and will refuse the appointment in cases where it is not clearly shown that the appointment will be beneficial to the parties in interest." In Alderson on Receivers, section 351, it is said: "The policy of the law is to leave the affairs of corporate bodies to the management and control of their chosen agencies, and a minority of stockholders will not be permitted to displace corporate authority and control by substituting therefor the policy, management and control of the courts, except in such cases of plain fraud or misadministration as works manifest wrong to them." In 3 Cook on Corporations (6th Ed.) section 863, it is said: "A receiver will not readily be appointed in a suit by a stockholder to remedy the frauds or ultra vires acts of the directors or of the corporation itself. The court will not injure the whole enterprise in order to correct a wrong done to the enterprise. Other remedies will be applied." The foregoing principles have been frequently recognized by the courts of this state. In First National Bank v. Gage, 79 Ill. 207, 209, it is said: "There is no necessity shown by this bill for the appointment of a receiver, for there is no distinct charge of fraud. * * A receiver should be appointed in no case, unless it is made to appear there is an imperative necessity for the step, to preserve some particular property for such parties as shall be

behalf, if for any reason the directors are incapacitated or unwilling to perform the legal duty they owe to creditors. If should be observed, that the courts will not permit the directors from office, or restrain them generally from exercising the corporation, except in a case of obvious mismanagement. * * * If the powers of the directors are revoked by resolution of the shareholders, a receiver should be appointed until a meeting can be held and new directors elected by the majority." In Thompson on Corporations (2nd Ed.) section [illegible], it is said: "Courts hesitate to divest corporations into the hands of receivers, and prevent with extreme caution in the appointment of receivers, and will refuse the application in a case where it is not clearly shown that the objectionable will be beneficial to the parties in interest." In Gibson on Receivers, section [illegible], it is said: "The policy of the law is to leave the affairs of corporations, beside in the management and control of their duly elected officers, and a minority of stockholders will not be permitted, in ordinary corporate authority and control by substituting their own policy, management and control of the course. Cases in which a case of gross fraud or mismanagement is shown constitute exceptions to the rule." In 2 Cook on Corporations (5th Ed.) section [illegible], it is said: "A receiver will not usually be appointed in equity by a shareholder to remedy the fraud of majority in authorizing the directors to act for the corporation itself. The court will not assume the duties entrusted to such directors, but will leave the majority to remedy the wrongdoing." The foregoing principles have been frequently enunciated by the courts of this state. In Tyler National Bank v. Cone, 77 Ala. 347, 351, it is said: "There is no necessity shown by this bill for the appointment of a receiver, for there is no fiduciary lapse of trust. * * * a receiver should be restricted in an order, unless it is made to appear there is an imminent necessity for the act, or unless it

entitled to the benefit." In Independent Brewing Ass'n v. Klein, 135 Ill. App. 234, 245, it is said: "To put the property of a solvent, going concern into the hands of a receiver is not to be tolerated except as a dernier ressort where no other course can be found which will furnish a sufficient corrective." In Wheeler v. Pullman Iron & Steel Co., 143 Ill. 197, 207, it is said: "It is, however, fundamental in the law of corporations, that the majority of its stockholders shall control the policy of the corporation, and regulate and govern the lawful exercise of its franchise and business. * * Every one purchasing or subscribing for stock in a corporation impliedly agrees that he will be bound by the acts and proceedings done or sanctioned by a majority of the shareholders, or by the agents of the corporation duly chosen by such majority, within the scope of the powers conferred by the charter, and courts of equity will not undertake to control the policy or business methods of a corporation, although it may be seen that a wiser policy might be adopted and the business more successful if other methods were pursued. The majority of shares of its stock, or the agents by the holders thereof lawfully chosen, must be permitted to control the business of the corporation in their discretion, when not in violation of its charter or some public law, or corruptly and fraudulently subversive of the rights and interests of the corporation or of a shareholder." Furthermore, it is the law that where the receiver of a corporation is sought by minority shareholders on the grounds of fraud and mismanagement the facts constituting such fraud and mismanagement must be distinctly set forth. (34 Cyc. 113; 4 Thompson on Corp. sec. 4650; Heitkamp v. American Pigment Co., 158 Ill. App. 587, 591; Young v. Rutan, 69 Ill. App. 513, 517.) In Robinson v. Dolores Land & Canal Co., 29 Pac. Rep. 750, 753, it is said: "The conclusions of the pleader, stated as facts, broad generalizations, sweeping and comprehensive assertions of conspiracy,

[illegible] in her lowlies." In [illegible] v. [illegible], 3 N.Y. 122, 126, 1849, it is said: "It was the property of a corporation, being conceived into the model of a [illegible] is not to be interfered except on a [illegible] where no [illegible] in [illegible] v. [illegible], 120 Ill. 327, 337, 1887, it is said: "It is, however, [illegible] to the law of corporations, that the majority of its stockholders shall control the [illegible] of the corporation, and [illegible] of its [illegible] and business. * * Every one purchasing or subscribing for stock in a corporation impliedly agrees that it will be bound by the acts and proceedings done or sanctioned by a majority of the stockholders, or by the agents of the corporation duly chosen by such majority, within the scope of the powers conferred by the charter, and courts of [illegible] will not interfere to control the policy or business matters of [illegible]. Although it may be seen that a minority stockholder might be [illegible] the interests [illegible] of other [illegible] The majority of shares of its stock, or the agents by the majority thereof lawfully chosen, must be permitted to control the business of the corporation in the ordinary, even not in violation of its charter or some [illegible] law, or [illegible] and fraudulently subversive of the rights and interests of the corporation or of a stockholder." [illegible] v. [illegible] 2 [illegible] that every [illegible] of a corporation is [illegible] by majority stockholders on the grounds of fraud and mismanagement, the [illegible] conditions must first [illegible] management and be absolutely set forth. (4 Cyc. 1142; 1 Thompson on Corp. [illegible] Barbour v. Barbour [illegible] 41 Ill. App. 507, 1891; Fogg v. Jones, 25 Ill. App. 1887; [illegible] v. Jackson [illegible] Land & Canal Co., 28 Fed. 1886, 1886, it is said: "The consolidation of the plaintiff, effected on Fogg, based [illegible]

fraud, mismanagement and incompetency, cannot be made, in pleading, to supply the want of specific facts." In Thompson on Corporations, section 4656, it is said: "it is not enough to allege that the president of the corporation has appropriated large amounts of money of the corporation to his own use, the details of which the plaintiff is unable to state."

In view of the allegations of the bill in the present case and of the authorities above mentioned, we are of the opinion that the court erred in entering the order appointing the receiver, and for the reason that the bill and the accompanying affidavit did not sufficiently disclose such a state of facts as warranted such appointment, pendente lite. The interlocutory order is reversed.

REVERSED.

fraud, mismanagement and incompetency, means be given, in pleading, to supply the lack of records in fraud, or because of inadequacies, errors, etc., it is said "It is not enough to allege that the provisions of the constitution be complied large amounts of money or his connection to his own use, the details of which the plaintiff is unable to state.

In view of the allegations of the part in the present case and of the contradictory cases mentioned, it was the opinion that the court erred in sustaining the demurrer of the receiver, and for the reasons then the call and the accompanying affidavit did not sufficiently identify the claim of fraud to warrant such appointment, Reversed and The interlocutory order is reversed.

14 - 21175

UNIVERSITY HOSPITAL,
a corporation,
Defendant in Error,

vs.

JOHN B. DeVONEY,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

199 I.A. 307

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Two questions are presented for consideration, (1) whether there was a preponderance of evidence to support the judgment for $246 for board and nursing furnished by the hospital to DeVoney's sister, and (2) whether there should be a reversal for receiving incompetent evidence. The case was submitted for trial without a jury.

The ultimate question of fact to be found from the evidence was whether DeVoney had authorized the provision made for such board and nursing. It was originally made by her attending physician, Dr. Harrigan, at DeVoney's request, as the doctor claimed, but DeVoney denied giving him the authority to arrange therefor. Later, however, DeVoney visited the hospital. The cashier and superintendent thereof both testified that he then requested that his sister should not be moved from a private room to the ward and should have special nursing and said he would pay and be responsible for the bill. He also denied having such a conversation. The cashier also testified that the previous bills had been paid by his checks. While there is some room for inference that the patient's husband - working as he was in DeVoney's bank - may have sent the checks, yet if he did no explanation

is made for not producing them or calling him as a witness. We can not concur in the contention that the evidence was evenly balanced, and think the court's finding was justified.

While the evidence that Dr. Harrigan told the cashier to charge the bill to DeVoney was not competent proof of his agency, still it was harmless in a trial before the court where the evidence without it was sufficient to support the judgment.

AFFIRMED.

is made for not producing them or calling him as a witness. We can not concur in the contention that the evidence was evenly balanced, and think the court's finding was justified.

While the evidence that Mr. Harrigan told the cashier to charge the bill to Mooney was not conclusive proof of his agency, still it was incumbent on a trial before the court where the evidence without it was sufficient to support the judgment.

AFFIRMED.

419 - 21406

SUSIE E. SCHMIDT,
Appellee,

vs.

NATIONAL LIFE INSURANCE COMPANY OF THE UNITED STATES OF AMERICA,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

199 I.A. 316

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment in favor of the beneficiary under two accident insurance policies on which the suit was brought. The defenses relied on were (1) that the policies had lapsed by reason of failure to pay the renewal premium and (2) that the fatal injury resulted from "exposure to unnecessary danger". The case was tried without a jury, trial by which was waived.

As defendant issued and delivered to the assured a written "renewal receipt" for each policy, stating therein that it was "for value received" and that the policy was "continued in force" for the period covering the time of the accident, defendant could not be heard to contradict its effect by parole testimony that the delivery of the receipts was conditional on an oral promise to pay the renewal premiums and that they were not paid. (Baum v. Parkhurst, 26 Ill. App. 128; Ryan v. Cook, 172 Ill. 11.) Hence, testimony to that effect was properly disregarded.

The policies contained a provision that the insurance thereunder would not cover injuries resulting from

"exposure to unnecessary danger". Each covered loss of life within 30 days from bodily injuries received "while walking on a public highway by being knocked down, struck, run over or otherwise injured by actual contact with any conveyance * * * propelled by steam, electricity" etc.

The assured was struck and knocked down at night by a west bound electric street car in Madison Street, Chicago, at or near its intersection with North Campbell Avenue while walking south across the former on the west side of the latter, and died within a few hours from the injuries received. An east bound car was also approaching said avenue at the same time at which he appeared to be looking. The west bound car slackened its speed at the crossing and sounded its gong. As it slowed down the assured either hesitated or stopped for a moment and immediately afterward resumed his way across the tracks still watching the east bound car. As soon as the motorman of the west bound car observed his hesitation or stop, he released the brakes, turned on the power and went ahead to an almost instantaneous collision. The circumstances of the accident were such as to render it an exceedingly nice question whether the motorman and assured were not each justified in the belief that the other had halted to permit him to pass. If so it would seem to have been an unavoidable accident due to each being reasonably misled at a critical moment by the action of the other. Under the circumstances it became a question of fact whether there was an exposure to unnecessary danger and we think the evidence justified the finding that there was not.

In view of this conclusion it is unnecessary to

discuss whether the court erred in not holding as law the proposition submitted by defendant to be held as such, that the provision in the policy against exposure to unnecessary danger should be construed as equivalent to an agreement that the company shall not be liable if the insured comes to his death through his own negligence. For, if that be a correct statement of the law - which we do not decide - the character of the evidence was such as to require the court to determine as a question of fact whether the danger was unnecessary, and applying the common law rule of negligence thereto the court might well have found, as may be implied, that the assured was not guilty of a want of ordinary care in regarding, as he may well have done, the slowing down of the car as an invitation to pass in front of it. Considering the record from that point of view we find no occasion for disturbing the court's finding and judgment or discussing the distinctions of law urged between a voluntary and involuntary exposure to unnecessary danger.

AFFIRMED.

discuss whether the course pursued in not relying on the proposition contained by defendant on his behalf was, in the provision in the policy requiring assurance to be secured larger should be construed as equivalent to an agreement that the company should not be liable if the insured died in his death through his own negligence. Now, if there is a correct statement of the law - which is for the Judge - the character of the evidence was such as to require the case to determine on a question of fact whether the remedy was unnecessary, and on hearing the evidence and the rule of negligence therein the court might well have found, as may be implied, that the assured was not guilty of a case of ordinary care in engaging, as he may well have done, the climbing down of the cow as an inducement to come in front of it. Considering the reasons from that point of view we find no occasion for disturbing the verdict. Nothing and judgment or discussing the directions of a jury upon a voluntary and involuntary exposure to unnecessary danger.

ACCORDING.

5 - 21460

ILLINOIS SURETY COMPANY, a corporation, Defendant in Error,	ERROR TO
vs.	SUPERIOR COURT, COOK COUNTY.
DAVID L. FRANK, Plaintiff in Error.	

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The Illinois Surety Co. brought suit against David L. Frank on two written instruments signed by him, one an application to the company to become surety on a stay bond for a corporation, of which Frank's brother was secretary, containing an agreement of indemnity to the company, and the other a general bond of indemnity to the company against the same contingencies. At the close of the evidence the court directed a verdict for plaintiff for $2,561.81.

The only real question is whether there was any evidence tending to support the defenses raised. In considering it we may entirely disregard the first count of the declaration based on the indemnity agreement contained in the application, for the evidence raised no legitimate inference to support a defense to the second count which was based on the general indemnity bond.

The defenses pleaded and attempted to be made were that the instruments were signed by defendant in blank and delivered so signed upon conditions not complied with of which plaintiff had notice before delivery. The conditions claimed were that (1) defendant was not to be liable in excess of $40 (the amount of the premium to be

paid by the principal to the stay bond for the suretyship of plaintiff) and (2) that said principal should deposit certain cash to indemnify plaintiff.

If there was any purpose or intention of defendant that the delivery of the instruments containing his signature should be subject to either of such conditions, the record shows nothing to support the claim of notice thereof to plaintiff. Neither in the conversation defendant had with plaintiff's agent, Blount, over the telephone before he signed the instruments, nor in any conversation had with plaintiff's agents at the time of their delivery, or at any time before it, is there anything that can be interpreted as conveying either such intention or such notice.

Both Frank and his brother testified to a conversation between themselves had at the time the latter brought the papers to the former for his signature, intimating, perhaps, some such purpose on Frank's part to limit his liability. But Frank's brother was not plaintiff's agent, and there is no proof that he communicated the conversation to plaintiff when he delivered the signed instruments or at any time. If he was expected to do so, then the case comes within the settled principle that "when one of two or more persons must suffer loss, upon him whose conduct made it possible for loss to occur should the consequences ultimately rest." (Otis v. Gardner, 105 Ill. 436; McCarthy v. Crawford, 238 id. 38.)

We need not refer to the fact that the claimed defense was utterly inconsistent with the purpose and context of the instruments signed, for there was no evidence tending to support it.

Nor need we consider the point that defendant's name does not appear in the body of the indemnity agree-

ment on which the first count is based. It does so appear in the general bond declared on in the second count as to which his liability is clear and unquestioned by any competent evidence.

AFFIRMED.

(639)

110 - 21500

ANTONIO PARISI, doing business as A. PARISI & CO.,
Defendant in Error,

vs.

CONRAD HEDGN,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

199 I.A. 320

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The statement of claim in this case was in substance that plaintiff, Parisi, was a real estate broker and at defendant's request procured a purchaser for certain real estate belonging to defendant, to whom defendant sold the property for $9600, and that there was due and owing plaintiff $250 as a commission for the sale, according to rates fixed by the Chicago Real Estate Board.

Issue was taken in defendant's affidavit of merits only on the question of the procuring cause of the sale, defendant alleging that plaintiff was not and another broker was the procuring cause thereof, and the trial resulted in a verdict and judgment for plaintiff for $237.50.

But while the case was heard apparently to try that issue plaintiff's own undisputed evidence disclosed that there was no such contract as the implied contract sued on, but that there was an express contract that defendant would sell at a price to net him $9500 and that plaintiff should get his commission or compensation from the purchaser. The defendant also made the same kind of arrangement with the other broker through whom the deal

ANTONIO PARISI, doing
business as A. PARISI
& CO.,

Defendant in error,

vs.

PLAINTIFF in error.

MR. JUSTICE MARKS DELIVERED THE OPINION OF THE COURT:

The statement of claim in this case was in substance that plaintiff, Parisi, was a real estate broker and at defendant's request procured a purchaser for certain real estate belonging to defendant, to whom defendant sold the property for $9800, and that there was due and owing plaintiff $980 as a commission for the sale, according to rates fixed by the Chicago Real Estate Board.

Issue was taken on defendant's affidavit of merits only on the question of the procuring cause of the sale, defendant alleging that plaintiff was not a matter broker was the procuring cause thereof, and the trial resulted in a verdict and judgment for plaintiff for $980.

But while the case was heard apparently on the theory that issue plaintiff's was contingent evidence disclosed that there was no such contract in the initial agreement sued on, but that there was an express contract that defendant would call at a price to suit him first and that plaintiff should get his commission or compensation from the purchaser. The defendant also made the same kind of arrangement with the other broker through whom the deal

was closed at the price of $9600 after plaintiff had been negotiating with the same purchaser at the price of $9750. As testified to by the purchaser, he saved $150 in buying through the other broker.

If plaintiff was the procuring cause of the sale yet his rights, if any, do not rest on a contract whereby defendant was to pay any commission. And if the $9600 was actually paid over to defendant by a purchaser secured by plaintiff, and the understanding of the parties was such that the excess over $9500 was money had and received to plaintiff's use, then that state of facts presents a different cause of action from that relied on and attempted to be proved.

The point that the verdict is manifestly against the law and the evidence, though urged on other grounds, is so evident that the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

was closed at the price of $800.0 after plaintiff had been negotiating with the same purchaser at the price of $8000. as testified to by the purchaser, he saved $7200 in buying through the other broker.

If plaintiff was the procuring cause of the sale yet his rights, if any, do not rest on a contract whereby defendant was to pay any commission. And if the $800.0 was actually paid over to defendant by a purchaser secured by plaintiff, and the understanding of the parties was such that the excess over $800.0 was merely but and received to plaintiff's use, then that state of facts presents a different cause of action from Ch. 2 relied on and attempted to be proved.

The point that the verdict is manifestly against the law and the evidence, though urged on other grounds, is so evident, that the judgment must be reversed and be more remanded.

Reversed and Remanded.

439 - 21565

1600

AUGUST LARSON, Plaintiff in Error, vs. THE CITY OF CHICAGO, CARTER H. HARRISON, Mayor of said city of Chicago, and the BOARD OF TRUSTEES OF THE POLICE PENSION FUND OF THE CITY OF CHICAGO, Defendants in Error.	ERROR TO CIRCUIT COURT, COOK COUNTY.

199 I.A. 321

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

As stated in the opinion of the Supreme Court (268 Ill. 61) transferring this cause to this court, the only real question is whether the facts well pleaded in the petition of plaintiff in error Larson for a writ of mandamus - to which a general demurrer was sustained - against defendants in error commanding them to enroll his name as one of the beneficiaries of the police pension fund of the City of Chicago, show that he was entitled at the time he made his application to receive such pension under and by virtue of the provisions of the act providing for such fund, approved April 29, 1887, and in force July 1, 1887.

The application for pension was predicated on section 4 of said act which provides for retirement from the police force and a pension on account of physical disability received while in the service. The substance of the petition is set forth in the opinion of the Supreme Court and need not be repeated here, for it appears from the petition that the application for such pension was not made to the Board of Trustees of said fund until after the petitioner's discharge

from the police force. This fact alone rendered the petition obnoxious to general demurrer, as has been twice decided by this court. (McGann v. Harris, 114 App. Ct. 308; People v. Board of Police Pension Fund Commissioners, 116 id. 252.) In the cases cited it was held that the application for pension under section 4 of said act must be made while the applicant is still a member of the police force. The petition, however, alleges that the applicant was illegally discharged, but if so, said board is not given the power to reinstate him and, as said in the McGann case, supra, he can be reinstated only by rightful authority and until reinstated the board has not the power to retire and pension him. The act manifestly contemplates that the applicant shall already be in the active service when he makes request for pension under said section.

AFFIRMED.

175 - 21568

THE CITY OF CHICAGO, Defendant in Error, vs. CHARLES BAKER, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

199 I.A. 323

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

On a trial before the court without a jury, plaintiff in error was found guilty and fined on a complaint charging that he was "known to be a pickpocket and was found lounging in and prowling and loitering about a car and public place, and was unable to give a reasonable excuse for being so found in violation of section 2012 of the Chicago Code of 1911."

The only witness called to support the charge was the officer who arrested Baker and his companion, one Albert Johnson, while they were in a passenger car of one of the elevated street railroads of Chicago. The substance of his testimony was that he saw them board the car with other passengers at one station and that he took them off at another simply because he knew them to be pickpockets. He admitted that he did not see them do anything except to take a seat in the car on each side of another passenger. He said he had their "records", and thereupon the prosecutor handed up to the Judge a paper which the Judge read, purporting to contain information of several arrests of said Baker for various offenses and of the result of the proceedings thereon in different jurisdictions, the introduction of which was objected to. Of course it was not

competent evidence in that form, if at all.

There was no other evidence, unless the unsworn answers of both Baker and Johnson to questions of the court, not objected to, may be considered. Their answers however neither confirmed the claim that they were known as pick-pocketsnor supplied any other element of the offense charged in the complaint. In fact their answers refuted any inference - if any could reasonably or possibly be drawn from the officer's testimony - that they were "lounging in" or "loitering about" the car, or that they were not availing themselves of the right to travel in a public conveyance for legitimate purposes.

No matter how well founded the officer's knowledge of their criminal record, if any, may have been or his suspicion that they were on the car to pick pockets, there could not be a lawful conviction without adequate proof of the offense charged, and there was none.

Counsel for the city contends that in the absence from the record of the ordinance on which the complaint was based and also of an exception to the judgment we are precluded from reviewing the error assigned as to the insufficiency of the evidence. Neither point is well taken. The latter we deem settled by Miller v. Anderson, 269 Ill. 608. As to the former, the trial court took judicial notice of the ordinance, and no point is made requiring us to consider either its scope or construction. The only question before us arises, not on rulings which require knowledge of its context, but on errors assigned as to the sufficiency of the evidence. Considering that question we must assume, unless the contrary appears in therecord, that there was a city ordinance such as is referred to in the complaint,

of which the trial court took judicial notice, and that the acts charged in the complaint constituted a violation thereof. Such a complaint is sufficient. (City of Chicago v. Baranov, 189 Ill. App. 25.) But neither its sufficiency nor the existence of the ordinance is brought in question or involved in determining whether the averments of the former are sustained by the proof. It would be an anomalous practice for a court of review to assume in the absence of setting forth the ordinance in the record that a complaint based thereon charges an offense, and then refuse to consider the evidence in support thereof because such ordinance is not so set forth.

For insufficiency of the proof the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

176 - 21569

THE CITY OF CHICAGO,
Defendant in Error,

vs.

ALBERT JOHNSON,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

199 I.A. 325

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This record presents for review the identical questions decided in an opinion we have this day filed in No. 21,568, City of Chicago v. Baker.

The complaint is in the same language, based on the same city ordinance, and supported by the same character of proof, which we held in the Baker case, supra, to be insufficient to sustain a judgment of conviction. In fact, substituting the name of Baker for Johnson, the two records are practically alike. For reasons stated in said opinion the judgment ~~must~~ was be reversed and the cause remanded.

REVERSED AND REMANDED.

7644

477 - 20809

ANDERSON & LIND MANUFACTURING CO., Appellant,	
vs.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
CARPENTERS' DISTRICT COUNCIL OF CHICAGO et al. (Defendants), JOHN METZ et al., Appellees.	199 I.A. 330

STATEMENT OF THE CASE. This is an appeal to reverse that part of the decree entered in this case which directs the dissolution of a temporary injunction, and the dismissal of appellant's amended bill of complaint as to John Metz, Daniel Galvin, Abe Weinstein, Joseph Morava, Oscar Olson, Alex Jeschke and the United Brotherhood of Carpenters & Joiners of America (appellees here). The decree makes perpetual such temporary injunction as to the other defendants, in whose behalf no appeal has been perfected by any party in interest, and as to such defendants the correctness of the decree is not now in question.

The proceeding is a bill in equity by the Anderson & Lind Manufacturing Company, against the United Brotherhood of Carpenters & Joiners of America (hereinafter known as the Brotherhood); the Carpenters' District of Chicago, and a number of their officers, agents and members, charging them with conspiring to compel and coerce complainant (appellant) to unionize or organize its shop, and to establish and maintain, in order to aid them in securing such result, an illegal boycott against complainant and the product of its mill.

The complainant is an Illinois corporation, engaged

in the manufacture and sale of what is known as carpenter trim, in the city of Chicago. The bill alleges that complainant employs, on an average, 35 men; has about $75,000 invested in its business, and that its yearly business averages $150,000. Complainant's manufacturing plant is what is known as an "open shop", employing both union and non-union labor, although most of its employees have been non-union men.

The Brotherhood is an organization extending throughout the United States, having more than 200,000 members, who are carpenters, millwrights, machine hands, etc., with subordinate bodies termed "locals". Governing these "locals" and representing the Brotherhood in each city, is a district council, that governing Chicago and vicinity being termed the Carpenters' District Council of Chicago (hereinafter known as the District Council), which is composed of 104 delegates from the 33 "locals" in Chicago and vicinity. Each member of the District Council is a member of the Brotherhood, which organization has a membership in the Chicago district of approximately 30,000 members. The District Council has business agents of its own, as have the various locals, most of the latter being members of the District Council. The Brotherhood, the various locals, and the District Councils are all voluntary associations.

During the period covered by the transactions and events referred to by complainant's amended bill, John Metz was the president of the District Council, and Daniel Galvin its secretary and treasurer. At the same time O. C. Boone and Joseph B. Fox were business agents of the District Council, and Thomas F. Church, George W. Orris and Simon C. Grassl were business agents of certain Chicago locals of the Brotherhood, and members of the District Council. The amended

bill further alleges that all of these business agents were detailed and deputized by the District Council to organize non-union mills, including complainant's, for the purpose of inducing complainant and the others to each operate what is known as a "closed shop", and as a result of efforts of the Brotherhood, all but two of the forty or more mills of Chicago, of the size of complainant's had been thus organized by the year 1912, during which year a campaign was definitely directed by defendants against the complainant, culminating in the establishment of a boycott.

On April 1, 1912, there was and still is an organization in Chicago known as the Carpenters' and Builders' Association (hereinafter known as the Contractors' Association), whose members carry on a general building and construction business, and the carpenters and joiners working for the members of said Association are members of said Brotherhood. At that time, there was existing an agreement between the members of the Brotherhood and the Contractors' Association, that the union carpenters would handle and install material of every kind (which would include non-union made material) excepting prison made goods. Complainant refused to accede to the proposal of the Brotherhood for the unionizing of complainant's shop. The amended bill further alleges that the defendants, for the purpose of causing contractors and owners of property to refuse to contract with complainant for the furnishing of mill work and to cancel pending contracts therefor, did conspire together for the purpose of establishing a boycott against complainant, to compel it to sign an agreement to the effect that the complainant would operate only a "union" or "closed shop", and that defendants, in furtherance of said conspiracy to injure and ruin the business of complainant and to compel it to operate a closed

shop, had been preventing persons with whom complainant had contracts for the furnishing of material, from using such material, and are threatening persons who have made such contracts with complainant that they will not permit any of their members to work on any building in Chicago to which complainant is furnishing material, and have compelled, by threats and coercion, the cancellation of certain of said contracts; that in pursuance to such conspiracy the defendants are now maintaing a boycott against complainant. The amended bill further alleges that complainant has on hand large contracts and a great deal of work to perform throughout the city of Chicago, and that if such threats, intimidations and interferences with the business of such contractors and of complainant were continued, said contractors will be unable to install in said buildings the material furnished by complainant, and, as a result, these contracts will be cancelled and complainant will be irreparably damaged by reason thereof.

The bill further alleges that defendants are financially irresponsible, and that complainant has no adequate remedy for the protection of its business and interests except in a court of equity. The defendants filed joint and several answers to complainant's amended bill, denying a conspiracy. Upon evidence heard in behalf of complainant and defendants the temporary injunction against the District Council, Charles Grassl, Thomas W. Church, O. C. Boone, Herman Christenson, J. C. Johnson, Joseph B. Fox, Fred Schnackenback, and Peter Mraz, and any and all agents, employees, or representatives of said defendants, or either of them, restraining and enjoining them from directly or indirectly threatening, coercing or intimidating any person or persons whomsoever from buying, selling or otherwise dealing in the product of said complainant, and the furtherance of any conspiracy

or boycott against complainant's business or product; from interfering with, hindering, obstructing or stopping, by threats, coercion or intimidation, the work on any buildings to which said complainant is furnishing material; from assaulting or intimidating, by threats, the employees of complainant, or any person or persons who may become or seek to become employees of said complainant; from congregating about or near the place of business of complainant, or about or near any place where complainant may be employed, for the purpose of compelling, inducing or soliciting, by threats, coercion or intimidation, those dealing or attempting to deal with complainant to refuse to do so; and from doing any other act or thing in the furtherance of said conspiracy unlawfully to injure the complainant, substantially, in manner and form as set forth in the prayer of the amended bill, was made permanent. ✓

MR. JUSTICE McCOORTY DELIVERED THE OPINION OF THE COURT.

The first question we shall consider is, did the Circuit Court err in dissolving the temporary injunction theretofore entered against the Brotherhood? No question is presented here by any of the parties as to the correctness of the decree so far as it gave injunctive relief to complainant. By its provisions, the District Council and its agents representing all of the subordinate bodies of the Brotherhood in Chicago and vicinity were perpetually enjoined from unlawfully injuring complainant's business in manner and form, substantially, as set forth in the prayer of the amended bill. Each of the defendants enjoined is a member of the Brotherhood. Two of these defendants, Fox and Grassl, were organizers of the Brotherhood and were among the most active

or boycott against complainant's business or property; from interfering with, hindering, obstructing or stopping, by threats, coercion or intimidation, any part of any building to which said complainant is transacting business; from assaulting or intimidating, by threats, any employees of complainant, or any person or persons who may become or seek to become employees of said complainant; from maintaining picets or near the place of business of complainant, or about or near any place where complainant may be employed, for the purpose of hindering, interfering or molesting, by threats, coercion or intimidation, those desiring or attempting to deal with complainant to enter or go on; and from doing any other act or thing in the furtherance of such conspiracy unlawfully to injure the complainant, particularly, in manner and form as set forth in the petition of the complainant, now made permanent.

Mr. JUSTICE MCDONALD DELIVERED THE OPINION OF THE COURT:

Although there is now in dispute the temporary injunction restraining several against the trade-mark, it appears in pleadings lodged by way of interlocutory in the defendants of the issues as to the injunction, the Chancery Division, by its decision, has dissolved the temporary injunction. The defendants are engaged in Chicago and elsewhere manufacturing products from substantially imported commodity, known in commerce as "Jam" or "Jelly", and sold in containers of the usual half, quart or the customary quantity in a number of the "Jam" or "Jelly" containers, and the defendants objected to the use of the trade-mark, "Jam" or "Jelly" on the ground that it is a generic term, and not a trade-mark.

of those who carried on the boycott against the complainant. The District Council is an agency of the Brotherhood acting locally in a representative capacity in behalf of the national body. The evidence shows that threats were made that if complainant did not accede to defendants' demands to unionize its shop, these defendants would destroy complainant's business. It nowhere appears in evidence, however, that these wrongful acts were either authorized or ratified by the national organization. So far as the evidence discloses, the national organization did nothing inconsistent with its primary purpose and object to improve the condition of its members by unionizing all of the mills in Chicago engaged in the manufacture of carpenter trim.

The next question is, did the Circuit Court err in declining to make permanent the temporary injunction as to the remaining defendants? John Metz, president of the District Council, is shown conclusively by the evidence to have actively participated in the boycott against complainant. He was president of the District Council, and was the man to whom the various business agents of the District Council and locals in Chicago (including those made defendants in this case) reported. Daniel Galvin, secretary and treasurer of the District Council, assisted Grassl, one of the defendants, in having complainant's contract to furnish material to the Hylquist Sundholm Company cancelled, and further assisted said Grassl in securing from Nels A. Sundholm, of said company, an agreement not to buy further material from complainant until their troubles with the union were settled. The evidence clearly shows that Galvin concurred and participated in the unlawful boycott against complainant. At the request of one of the said business agents Joseph Morava, Oscar Olson and Alex Jeschke, also defendants, watched where

and to whom complainant's material was shipped and reported same to such business agent, so as to prevent the delivery thereof, thus participating in the conspiracy.

Abe Weinstein was business agent of local No. 504 of the Brotherhood, and a member of the District Council. The only evidence in regard to Weinstein, except the hearsay testimony of B. G. Anderson, is that of L. G. Anderson, who testified that Weinstein told the witness, "that they (complainant) should organize their shop as a union shop". Manifestly, such statement, unaccompanied by threat or intimidation, was not unlawful.

The evidence is insufficient to support the charge of conspiracy against Weinstein or the Brotherhood, and the Circuit Court did not err in dissolving the temporary injunction and dismissing complainant's bill as to them.

For the reasons herein stated, the decree of the Circuit Court will be affirmed in part and reversed in part, and the cause remanded with directions to the Circuit Court to modify the decree heretofore entered in this cause, so as to perpetually enjoin John Metz, Daniel Galvin, Joseph Moreva, Oscar Olson and Alex Jeschke in like manner and to the same extent as the other defendants therein and thereby perpetually enjoined.

DECREE AFFIRMED IN PART AND REVERSED IN PART, AND THE CAUSE REMANDED WITH DIRECTIONS.

582 - 20919

D. C. BOOTH,
Appellee,

vs.

FRED C. BELL, T. W. MAGILL,
G. B. BELL and AVERILL TILDEN,
doing business as H. O. STONE
& CO.,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment entered in the Municipal Court for $1100.00 in an action of the first class. The case was tried before the court without a jury on an agreed statement of facts, the court finding the issues for appellee, and assessed his damages at the sum of $1100, overruled motion of appellants for a new trial and arrest of judgment, and rendered judgment on the finding.

The plaintiff ~~(appellee)~~, residing in Spearfish, S. D., was the owner of a four flat building in Chicago, Illinois, subject to an incumbrance of $1100, which became due and payable on May 1, 1914. The defendants ~~(appellants)~~ received a letter from plaintiff bearing date of September 6, 1913, in which he requested defendants to find a purchaser for said property and to inform him how much they could probably sell the equity for, and what their commissions would be; that there was a mortgage of $1100 on the property with interest at 6%; that he would rather sell the equity for cash than to continue renting. Plaintiff also in such letter asked defendants to obtain tenants for and manage said property for plaintiff. Defendants replied thereto,

This is an appeal from a judgment entered in the Municipal Court for [illegible] in an action of the first class. The case was tried before the court without a jury on an agreed statement of facts. The court finding the issues for appellee, and assessed his damages at the sum of [illegible], overruled motion of appellants for a new trial and moved of judgment, and rendered judgment on the finding.

The plaintiff (appellee), residing in [illegible], G. D., was the owner of a four flat building in [illegible], Illinois, subject to an incumbrance of [illegible], which became due and payable on May 1, 1914. The defendants (appellants) received a letter from plaintiff bearing date of [illegible] 4, 1914, in which he requested defendants to find a purchaser for said property and to inform him some [illegible] probably will be willing for, and what terms defendants would be; that there was a mortgage of [illegible] on the property with interest at 6%; that he would rather sell the equity for cash than to continue renting. Plaintiff then on [illegible] letter asked defendants to obtain a purchaser for and manage said property for plaintiff. Defendants replied thereto.

consenting to act as his agents and manage said property and added the following:

> "In regard to the sale of the property, our Mr. Johnson will write you * * * as soon as he looks at the property."

On September 27, 1913, plaintiff called at the office of defendants in Chicago and upon inquiry was then informed by Johnson, one of the defendants' employees, that in his opinion plaintiff's property was worth $3500. On November 25, 1913, defendants received a letter from plaintiff as follows:

> "Will you kindly advise me if there is any prospect for sale of the four flat building at 3124 Clybourn Avenue within a few weeks. I accepted the valuation placed upon it by your Mr. Johnson with the expectation of a quick sale and if possible to do so I would be pleased to make a sale soon."

Defendants replied to said letter assuring plaintiff that they would do everything possible to sell plaintiff's property. On or about February 1, 1914, a certain Himmelfarb offered defendants $2500 for a good title, free and clear of all incumbrances, for the real estate in question, and to pay defendants commissions for making said sale. On February 3, 1914, plaintiff received from defendants the following telegram:

> "Can get you twenty-five hundred dollars net cash for Clybourn Avenue property. Wire."

On February 4, 1914, defendants received the following telegram from plaintiff:

> "Will accept twenty-five hundred dollars net cash for Clybourn Avenue property."

Upon receipt of the last mentioned telegram, defendants proceeded to make sale upon the terms of Himmelfarb's offer, and plaintiff, thereupon, received the following letter from defendants, dated February 10, 1914:

> "We have closed contract of sale on your property at 3124 Clybourn Avenue at a price of $2,500.00 net to you, as per our telegram.

> This, of course, is made with the understanding you will pay for a continuation of abstract down to date showing good title and you will also have to pay the taxes for last year, which of course are gone by."

Plaintiff also received from defendants the statutory form of warranty deed, which recited a consideration of $10 and other good and valuable consideration, the terms of which deed conveyed and warranted to Himmelfarb the real estate in question, subject to a trust deed due May 1, 1914, and all taxes and special assessments levied for the year 1913, which deed was duly signed and acknowledged by plaintiff and his wife, returned to defendants and filed for record in Cook County, Illinois, on March 7, 1914.

The defendants deducted from the proceeds of the sale $1121.10 the amount of the indebtedness secured by trust deed on said property, together with other charges. Plaintiff received from defendants a letter dated March 9, 1914, as follows:

> "Enclosed you will find our check for $1,288.12, together with statement showing the figures in the closing of the sale of your property at 3124 Clybourn Avenue."

Upon receipt of such letter, plaintiff sent defendants the following telegram:

> "Letter and check received entirely unsatisfactory. Wired my lawyers to begin immediate action in case you refuse to comply with your written and telegraphic offer. Check returned."

On April 1, 1914, the parties hereto stipulated that said check had been tendered and the tender refused, and that plaintiff might use and cash same without prejudice.

In determining whether or not the finding and judgment of the Municipal Court is supported by the evidence, it becomes necessary, in the light of all the facts and circumstances in evidence, to construe the words "net cash" as used by the respective parties, in relation to the sale of the

property in question. In plaintiff's first communication with defendants, he informed them that he wished to sell his equity in said property, later writing them that he accepted the valuation of $8500 placed upon the property by defendants' representative, Mr. Johnson, with the expectation of a quick sale. In the case of Gibbs v. People's National Bank, 198 Ill. 307, the People's National Bank offered to sell certain real estate owned by it, for $7000 net, free of all commissions, taxes and other charges. The buyer refused to take said real estate subject to certain special assessments thereon and tendered to owner the sum of $7250.00 and demanded a deed to the premises. The owner refused to accept the tender and to do anything further in the matter, whereupon appellant filed his bill for specific performance. The court on page 311 said, "The consideration being $7000 net, it follows, if the word 'net' be construed as being used to express its ordinary, common and usual meaning, as is the rule where it does not appear that it was used in any other or peculiar sense, (Royal Templars v. Curd, 111 Ill. 284; Schneider v. Turner, 130 id. 28;) it excludes the appellant's theory that out of the $7000 net, certain special assessments were to be paid. The word 'net' is defined by the Century Dictionary and Cyclopedia as 'clear of anything extraneous, with all deductions (such as charges, expenses, discounts, commissions, taxes, etc.,) made;' and the American and English Encyclopedia of Law, (vol. 16 -1st ed.- p. 487,) 'after deductions made; clear of all charges; free from expenses.' Further definitions are unnecessary. That the above express the word's well known and usual meaning can not be denied, and that it would be $5536.86 net, and not $7000 net, that appellee would receive if appellant's contention was sustained is too plain to admit of argument."

Under all the facts and circumstances in this case, this court is of the opinion that the finding and judgment of the Municipal Court is supported by the evidence, and that such judgment should be affirmed.

JUDGMENT AFFIRMED.

644 - 20982

EARL H. MACOY,
Appellee,

vs.

JAMES D. BARTON,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $1467 and costs recovered by appellee against ~~James D. Barton~~, defendant ~~(appellant here)~~, said amount representing the balance alleged to be due plaintiff on defendant's promissory note for $2000. A writ of attachment issued in connection with said suit was served on the American Amusement Association, who filed its answer admitting it had become indebted to defendant in the sum of $644.24. The court found the issues as to the attachment issue, as well as to the merits, against defendant.

Defendant delivered to plaintiff ~~(appellee)~~ his said promissory note for $2000 payable six months after date and at the same time four certain promissory notes, of $1000 each, executed by A. Wilbur Crane, payable to order of defendant, and by him endorsed, together with a $1000 certificate of stock of the National Printing & Engraving Co., attached to each note. Defendant was indebted to said company (of which plaintiff was president, and defendant vice president) and had given to it, to apply on such indebtedness, his promissory note for $13,200, and it was agreed that the proceeds of the first Crane note to become due would be applied on the principal and interest of defendant's said note for $13,200, which was subsequently done, leaving

[illegible] - [illegible]

[illegible] v. [illegible],
Appellant,

vs.

JAMES D. [illegible],
Appellant.

[illegible] FROM
MONTGOMERY COUNTY
[illegible] CO.

[illegible]

[illegible]. JUSTICE MCGOVERN DELIVERED THE OPINION OF THE COURT.

[illegible]

[illegible] recovered by [illegible] against James D. [illegible], defendant (appellant here), said amount representing the balance alleged to be due plaintiff on defendant's promissory note for $2000. A writ of attachment issued in connection with said suit was served on the American [illegible] Association, who filed its answer admitting it had become indebted to defendant in the sum of $[illegible]. The court found the issues as to the attachment issue, as well as to the merits, against defendant.

Defendant delivered to plaintiff (appellee) his said promissory note for $2000 payable six months after date and at the same time four certain promissory notes, of $[illegible] each, executed by A. [illegible], payable to order of defendant, and by him endorsed, together with a $[illegible] certificate of stock of the [illegible] [illegible] Co., attached to such note. Defendant was interested in said company (of which plaintiff was president, and defendant vice president) and had given he it, to apply on such indebtedness, his promissory note for $[illegible], and it was agreed that the proceeds of the first three notes to become due would be applied on the principal and interest of defendant's

an unpaid balance owing thereon of $12,998, for which sum defendant gave said company his promissory note in lieu of the original note of $13,200. Defendant testified that when he gave to plaintiff the three Crane notes remaining unpaid he then said to plaintiff, - "You can have these for this note of $2000 if I don't pay it, and if there is anything left you can apply it on any indebtedness I may owe the National Printing & Engraving Co." During defendant's absence in Europe, all of the notes in question were paid to plaintiff who applied the proceeds of same to the interest and principal of defendant's promissory note for $12,998 and defendants other indebtedness to the National Printing & Engraving Company.

The question of fact presented for our determination is, - Was there an agreement between the parties to the effect that the Crane notes were delivered by defendant to plaintiff to secure the unpaid balance of $1467 on defendant's said note to plaintiff for $2000, and was the application by the plaintiff of the proceeds of the Crane notes to defendant's indebtedness to the National Printing & Engraving Co., without authority? Plaintiff testified that the Crane notes were delivered to him by defendant immediately prior to the latter's departure for Europe, to apply to any contingency that might arise in defendant's affairs, with directions by defendant to use such notes as plaintiff's judgment might dictate. Defendant did not deny his indebtedness to said company, but complains of the application by plaintiff of the proceeds of the three Crane notes to such indebtedness, instead of applying such proceeds to the unpaid balance of $1467 owing plaintiff by defendant on the latter's said $2000 note.

Under all the facts and circumstances in evidence,

an unpaid balance owing thereon of $12,000, for which the defendant gave said company his promissory note in lieu of the original note of $15,000. Defendant contends that when he gave to plaintiff the three notes totaling remaining unpaid he then said to plaintiff, - "Take one here above for this note of $2000 if I don't pay it, and if there is anything left you can apply it on my indebtedness I may owe the Kiplinger Printing & Engraving Co." Having unfortunately absence in Europe, all of the notes in question were paid to plaintiff who applied the proceeds of same to the interest and principal of defendant's promissory note for $12,000 and defendant's other indebtedness to the Kiplinger Printing & Engraving Company.

The question of fact presented for our determination is, - was there an agreement between the parties to the effect that the three notes were delivered by defendant to plaintiff to secure the unpaid balance of $12,000 on defendant's note to plaintiff for goods, and was the application by the plaintiff of the proceeds of the three notes to defendant's indebtedness to plaintiff a voluntary [illegible] or was it made pursuant to defendant's direction, to enable him to make good his departure for Europe, to apply to any indebtedness that might exist in defendant's favor, with directions by defendant to use such notes as plaintiff's judgment might direct. Defendant did not deny his indebtedness to that company, but complains of the application by plaintiff of the proceeds of the three drafts notes to such indebtedness, instead of applying such proceeds to the unpaid balance of $12,000 owing plaintiff by defendant on the latter's said note.

Under all the facts and circumstances in evidence,

we are of the opinion that the evidence preponderates in favor of the plaintiff, and that the judgment of the Municipal Court should be affirmed.

JUDGMENT AFFIRMED.

687 - 21038

MAUDE B. HELM and EVELYN HELM, by Maude B. Helm, her next friend, Appellants, vs. ILLINOIS COMMERCIAL MEN'S ASSOCIATION, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

Edgar L. Helm, deceased, on July 26, 1905, applied for and received a policy of insurance in the Illinois Commercial Men's Association, defendant (appellee here). He was killed in an accident on February 1, 1912. Maude B. Helm and Evelyn Helm, wife and daughter, respectively, of the deceased, and beneficiaries under said policy, brought this suit to recover $5000, the sum named therein. The case was submitted to the court without a jury. At the close of plaintiffs' case, upon motion of defendant, the court found the issues in favor of defendant and entered judgment for costs against plaintiffs (appellants here). From such finding and judgment plaintiffs appeal. The question is, therefore, whether plaintiff made out a prima facie case.

The questions raised on the pleadings are whether (1) At and before the time of the death of Edgar L. Helm, did he unnecessarily expose himself to danger, or was he at such time in the exercise of due diligence for his self protection? (2) Was Edgar L. Helm a member of the Illinois Commercial Men's Association at the time of his death on February 1, 1912?

[illegible] - [illegible]

MAUDE R. HALE and EVELYN HALE,
by Maude R. Hale, her next
friend,

Appellants,

APPEAL FROM

[illegible] COURT

OF [illegible].

vs.

ILLINOIS COMMERCIAL MEN'S
ASSOCIATION,

Appellee.

[illegible] I.A. [illegible]

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

Edgar L. Hale, deceased, on July [illegible], 1925, applied for and received a policy of insurance in the Illinois Commercial Men's Association, defendant (appellee here). He was killed in an accident on February 1, 1932. Maude R. Hale and Evelyn Hale, wife and daughter, respectively, of the deceased, and beneficiaries under said policy, brought this suit to recover $5000, the sum named therein. The case was submitted to the court without a jury. At the close of plaintiffs' case, upon motion of defendant, the court found the issues in favor of defendant and entered judgment for costs against plaintiffs (appellants here). From such finding and judgment plaintiffs appeal. The question is, therefore, whether plaintiff made out a *prima facie* case.

The questions raised on the pleadings are whether (1) At and before the time of the death of Edgar L. Hale, did he unnecessarily expose himself to danger, or was he at such time in the exercise of due diligence for his own protection? (2) Was Edgar L. Hale a member of the Illinois Commercial Men's Association at the time of his death on February 1, 1932?

The contract in this case consists of the application for insurance, the policy issued to the assured and the by-laws of the Association. The by-laws offered in evidence by plaintiffs contained the following provision, - "This association shall not be liable to any person for any indemnity or benefit for * * * death * * * resulting from an accident to a member which happened while said member was unnecessarily exposing himself to danger; (or) was not in the exercise of due diligence for his self protection; * * * ." Plaintiffs' evidence showed that the deceased was killed while walking along a railroad right of way at a point between Vickers and Walton, Va.; that there was no public highway between Vickers and Walton, and it was the only practicable way of travel for pedestrians, between these two points and was much traveled by people passing from one point to the other; that deceased was struck by a west bound passenger train, while a freight train was passing the deceased in an easterly direction. The engineer and fireman of the locomotive of the passenger train, who testified in behalf of plaintiffs, were the only witnesses who testified as to the manner in which deceased met his death. The engineer did not see deceased before he was killed. The fireman testified that when he first saw deceased, the latter was walking alongside of the freight train and on the ends of the ties supporting the rails upon which the passenger train was running, and that at that time deceased was about 300 feet in front of the passenger engine, with his back to the same, facing and walking in the same direction in which the passenger train was going. The accident happened on a long "stiff" curve and the witness was prevented from seeing the deceased sooner because his view was cut off by the freight train.

The contract in this case consisted of the application for insurance, the policy issued to the insured and the by-laws of the association. The by-laws offered in evidence by plaintiff's contained the following provision, - "This insured shall not be liable to any person for any injury or benefit for * * * death * * * resulting from an accident to a member while improperly while such member was unconscious, by exposing himself to danger; (or) was not in the exercise of due diligence for his self protection; * * *." Plaintiff's evidence showed that the deceased was killed while walking along a railroad right of way at a point between Vickers and Melton, Va.; that there was no public highway between Vickers and Melton, and it was the only practicable way of travel for pedestrians, between these two points and was much traveled by people passing from one point to the other; that deceased was struck by a west bound passenger train, while a freight train was passing the deceased in an eastbly direction. The engineer and fireman of the locomotive of the passenger train, who testified in behalf of plaintiff, were the only witnesses who testified as to the manner in which deceased met his death. The engineer did not see deceased before he was killed. The fireman testified that when he first saw deceased, the latter was walking alongside of the freight train and on the side of the track nearest the rails upon which the passenger train was running, and that at that time deceased was about ten feet in front of the passenger engine, with his back to the same, facing and walking in the same direction in which the passenger train was going. The accident happened on a long "still" curve and the witness was prevented from seeing the deceased

[illegible]

He testified that it could not have been over five seconds from the time he first saw deceased until the latter was struck; that the east and west bound tracks were about five feet apart; that he had seen people step in safety between these tracks; that a cold wind was blowing at the time; that deceased appeared to be carrying his grip upon his back with his head bent over, and, apparently, had his hands in his pockets. Plaintiffs' evidence therefore tended to show that the deceased at the time in question unnecessarily exposed himself to danger and failed to exercise due diligence for his self protection. In order to recover they were bound to prove the contrary. Hence the judgment of the Municipal Court will therefore be affirmed.

JUDGMENT AFFIRMED.

He testified that it could not have been over five seconds from the time he first saw deceased until the latter was struck; that the east and west bound tracks were three feet apart; that he had seen people step in safety between these tracks; that a cold wind was blowing on the time; that deceased appeared to be carrying his grip upon his back with his head bent over, and, apparently, had his hands in his pockets. Plaintiffs' evidence therefore tended to show that the deceased at the time in question was overwhelmed, opposed himself to danger and failed to exercise due diligence for his self protection. In order to recover they were bound to prove the contrary. Hence the judgment of the trial court will therefore be affirmed.

1647

687 - 21038

MAUDE B. HELM and EVELYN HELM, by Maude B. Helm, her next friend, Appellants, vs. ILLINOIS COMMERCIAL MEN'S ASSOCIATION, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

199 I.A. 344

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

Edgar L. Helm, deceased, on July 26, 1905, applied for and received a policy of insurance in the Illinois Commercial Men's Association, defendant (appellee here). He was killed in an accident on February 1, 1912. Maude B. Helm and Evelyn Helm, wife and daughter, respectively, of the deceased and beneficiaries under said policy, brought this suit to recover $5000, the sum named therein. The case was submitted to the court without a jury, resulting in a finding of the issues and judgment for costs against the plaintiff (appellants here). From such finding and judgment plaintiffs appeal.

The questions before this court for determination are, - (1) Was Edgar L. Helm a member of the Illinois Commercial Men's Association at the time of the accident which resulted in his death on February 1, 1912? (2) At the time of such accident did he unnecessarily expose himself to danger? (3) Was he at such time in the exercise of due diligence for his self protection? We shall proceed to discuss the questions in the order named.

The contract in this case consists of the

application for insurance, the policy issued to the assured and the by-laws of the Association. The by-laws contained the following provisions:

> "Each member of this association shall pay the sum of One dollar ($1.00) annually in advance as dues, which sum for each year shall be due and payable on the second day of January of each year. * * * And any member failing to pay his annual dues when the same are due and payable shall cease to be a member of this association; and no person shall or may be reinstated as a member hereof, except by the Board of Directors, or a duly constituted committee thereof, on terms to be prescribed by the said Board of Directors."

It was further provided by said by-laws that it was the duty of each member of the association promptly to remit the amount of each assessment levied by the Board of Directors to the Treasurer of the association, and that any such member as shall fail to remit or to pay said assessment within forty-five days after the date of the notice thereof shall ipso facto cease to be a member of the association and his policy of insurance shall then and there cease and be determined.

Immediately prior to October 2, 1911, Helm was suspended by the association by reason of his failure to pay a certain assessment. The deceased was a traveling salesman and resided at that time with his wife and daughter at Roanoke, Va. On October 2, 1911, defendant mailed to its delinquent members, in which class Helm on that date belonged, a circular letter in which the assured was requested to "simply fill out and send the enclosed (reinstatement) card with $2.00. This amount will be for reinstatement and your insurance in full to December 15th. * * * " On October 12, 1911, a letter containing the following was sent by defendant to the deceased:

> "Important Read This.
> The Board of Directors have instructed me to notify all former members of the I. C. M. A., that if they fill out and sign the enclosed reinstatement card

> and send it in with $3.00 on or before December 15th, the remittance will be credited so as to carry their insurance to March 15th and pay their annual dues for next year. * * * "

On October 20, 1911, a similar communication was addressed by defendant to deceased. On October 18, 1911, Mrs. Helm, wife of the deceased, mailed to defendant $2.00 in payment of assessment #67 (non-payment of which had lapsed said policy), receipt of which was acknowledged by defendant under date of November 6, 1911, as follows:

> "Received of E. L. Helm Two Dollars, payment in full for reinstatement to membership in the Illinois Commercial Men's Association. This re-news your old policy No. 34879."

which payment paid his insurance in full to December 15, 1911. After the annual dues became due and payable, the members of the association were informed by letter on January 22, 1912, that there was "no assessment with this mail." Subsequent to the death of the insured, a letter was received by plaintiffs' attorneys from the defendant which stated that "Mr. Helm was reinstated in November (1911) on the payment of $2.00, but his membership lapsed on January 2, for failure to pay the annual dues. A delinquent card was mailed to all members who failed to pay annual dues or assessment #69, or both, in January, 1912, and one was mailed to Mr. Helm, informing him that his membership had lapsed and that $1.00 for annual dues would have to be paid before he could be reinstated. He never paid these dues and never took any steps to renew his contract." There is no other evidence in this record that such delinquent notice was sent to or received by the assured, or his beneficiaries, or either of them, nor that his membership in said association had lapsed. The evidence does not disclose that notice of the March, 1912, assessment had been sent by defendant to the assured.

On February 2, 1912, defendant received a telegram

from Roanoke, Va., to the effect that the insured was on that day instantly killed, to which defendant replied, "Edgar L. Helm not a member of our association when killed." On January 30, 1912, three days before his death, defendant addressed a letter to the assured, apparently as a member of the association. In the case of Conductors' Benefit Assn. v. Tucker, 157 Ill. 194, the court said: "Where a life insurance policy provides for a forfeiture for the non-payment of the annual premium on or before a specified time, such provision is for the benefit of the insurance company, and the company has a right to waive the forfeiture and dispense with a prompt payment of the premium at the time when it is due. Unless the circumstances show a clear intention to declare a forfeiture it will not be enforced. Where the practice of the company, and its course of dealing with the insured, and others known to the insured, has been such as to induce a belief that so much of the contract as provides for a forfeiture in a certain event will not be insisted upon, the company will not be allowed to set up such forfeiture as against one in whom their conduct has induced such belief." It will be noted that while the by-laws of the defendant association provide that if a member fails to pay his assessment or annual dues within a certain time, his membership ceases, it was only upon failure of any such member to pay his assessment within the period provided that his membership would ipso facto cease. It must be presumed that defendant thus employed the words "ipso facto" with the purpose of making such provision self executing, and the absence of these words in relation to a default in payment of annual dues is, therefore, not without significance. Furthermore, the evidence tends to show that after deceased would have been otherwise in default if he had not paid his

annual dues, defendant continued to recognize him as a member, and if the assured was in default the evidence further tends to show that such default was thereby impliedly waived. Plattdeutsche Grot Gilde v. Ross, 117 Ill. App. 347, 351. The burden is upon the defendant Association to prove that the insured was not a member of the Association at the time of his death. Northwestern Traveling Man's Assn. v. Schauss, 148 Ill. 304, 307.

The By-laws further provide that, "This association shall not be liable to any person for any indemnity or benefit for * * * death * * * resulting from an accident to a member which happened while said member was unnecessarily exposing himself to danger; (or) was not in the exercise of due diligence for his self-protection; * * *."

Did the deceased unnecessarily expose himself to danger or fail to exercise due diligence for his self protection at and before the time of the accident in question? The deceased was killed while walking along a railroad right of way at a point between Vickers and Walton, Va. There was no public highway between Vickers and Walton, and it is undisputed that the only practicable way of travel for pedestrians, between these two points, was by using such railroad right of way, which was much traveled by people passing from one point to the other. The railroad, where deceased was killed, ran in an easterly and westerly direction. Deceased was struck by a west bound passenger train, while a freight train passing the deceased was going in an easterly direction. The passenger train was late in its schedule time and was running at a speed estimated at 40 miles per hour. The engineer and fireman of the locomotive of the passenger train, who testified in behalf of defendant, were the only witnesses who testified as to the manner in which deceased met his death. The engineer did not see deceased before he was killed. The fireman testified that when he first saw deceased, the latter

was walking alongside of the freight train and on the ends of the ties supporting the rails upon which the passenger train was running, and that at that time deceased was about 300 feet in front of the passenger engine, with his back to the same, facing and walking in the same direction in which the passenger train was going. The accident happened on a long "stiff" curve and the witness was prevented from seeing the deceased sooner because his view was cut off by the freight train. The fireman further testified that no whistle was blown on the engine on which he was riding; that although the bell was ringing, it did not ring very well; that there was much noise at that time because of the passing freight train; that the witness, because of the exhaust steam from his engine, was unable to see whether or not deceased looked in the direction of the passenger train approaching him from the rear, and that it could not have been over five seconds from the time he first saw deceased until the latter was struck. He further testified that the east and west bound tracks were about five feet apart; that he had seen people step in safety between these tracks; that a cold wind was blowing at the time; that deceased was walking and appeared to be carrying his grip upon his back with his head bent over, and, apparently had his hands in his pockets.

We are of the opinion that in this case it was not shown by a preponderance of the evidence either that the deceased was not a member of the Association at the time of said accident, or that he at such time unnecessarily exposed himself to danger or failed to exercise due diligence for his self protection. The judgment of the Municipal Court will therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

687 - 21038.

MAUDE B. HELM and EVELYN HELM, by Maude B. Helm, her next friend, Appellants, vs. ILLINOIS COMMERCIAL MEN'S ASSOCIATION, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

Edgar L. Helm, deceased, on July 26, 1905, applied for and received a policy of insurance in the Illinois Commercial Men's Association, defendant (appellee here). He was killed in an accident on February 1, 1912. Maude B. Helm and Evelyn Helm, wife and daughter, respectively, of the deceased, and beneficiaries under said policy, brought this suit to recover $5000, the sum named therein. The case was submitted to the court without a jury. At the close of plaintiffs' case, upon motion of defendant, the court found the issues in favor of defendant and entered judgment for costs against plaintiffs (appellants here). From such finding and judgment plaintiffs appeal. No proposition of law was submitted to the court and the record does not disclose the ground or grounds upon which the court based its finding.

The questions before this court for determination are - (1) At and before the time of the death of Edgar L. Helm, did he unnecessarily expose himself to danger, or was he at such time in the exercise of due diligence for his self protection? (2) Was Edgar L. Helm a member of the Illinois Commercial Men's Association at the time of his death on

February 1, 1912?

In view of the conclusion arrived at by the court, it will only be necessary to consider the first question. The contract in this case consists of the application for insurance, the policy issued to the assured and the by-laws of the Association. The by-laws contained the following provision, - "This association shall not be liable to any person for any indemnity or benefit for * * * death * * * resulting from an accident to a member which happened while said member was unnecessarily exposing himself to danger; (or) was not in the exercise of due diligence for his self-protection; * * * ." The deceased was killed while walking along a railroad right of way at a point between Vickers and Walton, Va. There was no public highway between Vickers and Walton, and it is undisputed that the only practicable way of travel for pedestrians, between these two points, was by using such railroad right of way, which was much traveled by people passing from one point to the other. Deceased was struck by a west bound passenger train, while a freight train passing the deceased was going in an easterly direction. The engineer and fireman of the locomotive of the passenger train, who testified in behalf of plaintiffs, were the only witnesses who testified as to the manner in which deceased met his death. The engineer did not see deceased before he was killed. The testimony of the fireman tended to show that the deceased, at the time in question, did not exercise due diligence for his self protection. The fireman testified that when he first saw deceased, the latter was walking alongside of the freight train and on the ends of the ties supporting the rails upon which the passenger train was running, and that at

February 1, 2007

that time deceased was about 300 feet in front of the passenger engine, with his back to the same, facing and walking in the same direction in which the passenger train was going. The accident happened on a long "stiff" curve and the witness was prevented from seeing the deceased sooner because his view was cut off by the freight train. He testified that it could not have been over five seconds from the time he first saw deceased until the latter was struck; that the east and west bound tracks were about five feet apart; that he had seen people step in safety between these tracks; that a cold wind was blowing at the time; that deceased was walking and appeared to be carrying his grip upon his back with his head bent over, and, apparently, had his hands in his pockets. Whether or not the deceased at the time in question unnecessarily exposed himself to danger or failed to exercise due diligence for his self protection presents a question of fact about which reasonable minds might differ. This court does not feel warranted therefore in holding that the trial court erred in finding such issue in favor of defendant. The judgment of the Municipal Court will therefore be affirmed.

JUDGMENT AFFIRMED.

53 - 21771

KAZIMIER WROBLEWSKI,
Defendant in Error,

vs.

CITY OF CHICAGO,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

199 I.A. 346

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for wages or salary as a patrolman for the period from May 31, 1910, to December 7, 1910, during which he was suspended and discharged, but reinstated at the latter date. Upon trial by the court he had judgment for $625.

This judgment cannot be allowed to stand. The claim of plaintiff is subject to the same infirmity found in many like cases upon which this court and the Supreme Court have passed. Plaintiff has failed to show the existence of the office of patrolman during the period above stated and his legal right to hold it. Decisive against plaintiff's claim are the decisions in Bullis v. City, 235 Ill. 472; Gersch v. City, 250 Ill. 551; Gillen v. City, 177 Ill. App. 318; People ex rel. Hickland v. City, App. Court No. 20699, decision rendered October 6, 1915. In these opinions all the points presented in the instant case are discussed, with conclusions adverse to plaintiff's contention.

For the reasons above indicated the judgment is reversed, and as there can be no recovery judgment of nil capiat is entered in this court.

REVERSED AND JUDGMENT HERE.

84 - 21940

(1649)

ADKINS, YOUNG & ALLEN COMPANY, a corporation, Appellee, vs. RHINELANDER PAPER COMPANY, a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

199 I.A. 347

MR. PRESIDING JUSTICE McSURELY

DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for a balance said to be due for installing in defendant's manufacturing plant what are called "Fuel Economy Gauges." Defendant in its affidavit of defense alleged failure of plaintiff to perform its contract; it also filed a claim of set-off. Upon trial by the court defendant was defeated as to its set-off, and plaintiff had judgment for $2,000.

Letters contained the contract of the parties. On September 22, 1913, plaintiff wrote to defendant offering to equip one of its boilers, No. 6, with "Indicating and Recording Gauges," with a guarantee that they would increase "the efficiency of evaporation at least five (5%) per cent," to be determined by tests. If the increase was not shown the device was to be removed free of charge. This offer was accepted. On January 3, 1914, plaintiff wrote as follows: "As per our contract of September 22nd, 1913, and your letter of the 30th ult., we take pleasure in submitting this contract that covers every detail of both our written and verbal agreements." Then follows a proposition to equip each of defendant's five other boilers with the

"Wilsey Fuel Economy Gauges," under the following conditions:

"We guarantee to increase the efficiency of steam production at least five (5) per cent over present figures.

This savings guarantee to be determined by two (2) evaporative tests each of one (1) week duration, one test under present conditions and the second test with the fireman taking advantage of our gauge readings. It is understood you will have one of your men check these figures at all readings and verify them to you.

In the event of test not being satisfactory to either party, duplicate tests are to be conducted.

If, according to these tests, five (5) per cent or more increase in the evaporation per fuel unit is shown, the complete installation is to be paid for within thirty (30) days of installation.

If less than five (5) per cent increase in efficiency is shown, the equipment is to be removed free of charge to you.

These efficiency tests are to be as stated, each of one (1) weeks duration, i. e., six (6) consecutive working days each. * * *

Price of complete installation as above outlined and subject to above guarantees, including our services as efficiency engineers, to be two thousand ($2000) dollars.

The installation on No. 6 boiler to be paid for as per previous contract if these tests are completed as outlined and show 5% or more."

This, also, was accepted, by notation on the letter.

The gauges having been installed, the tests contemplated were made, commencing February 16th and ending February 28th. At the conclusion of the tests it was reported by plaintiff's representative to the defendant that these tests showed an "increase in evaporation or efficiency of 17.24%." Defendant's manager expressed doubt as to the accuracy of these figures, saying that he wanted to run another test the following week. This conversation took place on Saturday. The manager said he knew there was something wrong with this test, and he wished to confirm it. Mr.

Adkins of the plaintiff company asked for a payment on account, and represented that they had been at considerable expense and that there was no question of making the saving of five per cent., and that they would like to have a little advance. Thereupon plaintiff was paid $425. At the same time plaintiff's representative was again told that defendant's manager was sure these figures were not correct and that he would make another test the following week. This was agreed to by plaintiff. This second test was made, and two days thereafter, that is on March 18th, defendant reported to plaintiff that this test "indicated a saving of 1.91%." Letters passed between the parties in which plaintiff argued that this second test showed the saving guaranteed, which claim was combatted by defendant. Finally, on April 14th, defendant wrote to plaintiff as follows:

> "Your favor of the 9th received and we do not agree with you that there has been an average saving of 10½% in our boiler room since installing your Economy Gauges.
>
> As advised you when here, the first test without the guages was not a practical one in any way as it showed the highest cost of fuel of any run ever made in the history of our mill. It was for this reason that I took advantage of our contract for a second test.
>
> Up to the present time we are not satisfied with the results shown since the last test showed a saving of less than 5% and we might have had this difference in firing from one week to another without any gauges attached.
>
> Please note, therefore, that we do not accept the apparatus."

The point of disagreement between the parties seems to be over the consumption of wood fuel in the respective tests, defendant claiming that in the first test this consumption was disregarded, and plaintiff claiming that this factor was of no importance. In June and July defendant had tests made as to the fuel value of wood such as was used

in its mill, but the court refused to allow the result of these tests to be shown.

The date on which defendant gave its check for $425 was February 28, 1914. Did defendant by so doing waive on that date its right to any further tests and accept the gauges? We hold that it did not. The device was something entirely new. Its inventor, Mr. Wilsey, says that "it indicates and records the ratio of heats in a heat-utilizing apparatus," that "it is an entirely new engineering principle." There is no explanation of its processes in the record understandable to a non-expert. Inquiry of counsel upon oral argument as to the nature of the device has failed to elicit any informing reply. It is apparent from the evidence before us that men accustomed to the practical operation of boilers were very doubtful of its practicability. They seem to have thought of it as one of those devices which look good upon paper but in practical use are of little value. With such a device, whose practicability was still in the experimental stage, it is hardly reasonable that defendant's manager, apparently a man of experience and judgment, would at once, upon a showing on paper of an extraordinary saving, be convinced and agree to accept the gauges without further tests. It is much more reasonable to believe his story, which indicates that at most he was hopeful, although skeptical, and that he complied with the request for payment on account only upon the representation that subsequent tests would prove the success of the device. The fact that the payment of $425 made was the same amount as the price of the first installation on boiler no. 6 is of no importance, as it is provided in the contract of January 3rd that the payment of the

latter item was to be made upon the same conditions with reference to tests as the other boilers. The contract provides that should the first test be unsatisfactory to defendant another test should be conducted. Defendant's notice to plaintiff of its intention to conduct another test, was notice that defendant was not satisfied with the first test; hence, defendant cannot be held ever to have waived any of the conditions of the contract or accepted the gauges.

Apparently in the second test the device failed to meet the requirements of the guarantee, and it was so reported to plaintiff. Whatever the fact may be as to the outcome of the second test, the burden is upon plaintiff to show that in this test the device worked as guaranteed. This the plaintiff has failed to do. Under its contract, in the event of such failure defendant was not obligated to pay, but plaintiff was obligated to remove the devices free of charge to defendant. No argument can be maintained based upon the fact that the devices remained in defendant's plant. Upon notice of their rejection by defendant, the duty of making the next move was upon plaintiff; it was its duty to remove them.

Plaintiff, having failed to show that its guarantee was made good, is not entitled to recover. Defendant, having made payment upon a condition to be subsequently performed and which thereafter failed, is entitled to recover on its set-off. The judgment is reversed, and judgment for the Shinelander Paper Company, a corporation, appellant, against the Adkins, Young & Allen Company, a corporation, appellee, for $434.38 is entered in this court.

REVERSED AND JUDGMENT HERE.

97 - 22022

WILLIAM J. SCOWN, Appellee, vs. COUNTY OF COOK, Appellant.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

199 I.A. 351

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for compensation for the services of himself and associates rendered to defendant at its request, in appraising the property of the Dunning Institution in Cook county. Plaintiff alleged that the claims of his associates had been duly assigned to him. Upon trial a jury returned a verdict for the plaintiff in the sum of $3,800 upon which judgment was entered.

In 1912 the County of Cook and the State Board of Administration of the State of Illinois began negotiations looking to the transfer of the Dunning Institution from the County of Cook to the State of Illinois. In connection with this transfer the Board of Administration, in February, 1912, requested the County Board of Cook County to furnish "a detailed inventory of all property belonging to Cook County which may be transferred to the State of Illinois on July 1, 1912." On March 4, 1912, pursuant to said request, the County Board adopted a resolution reciting that "The State Board of Administration has asked for an inventory of all the personal property now situated in said institution, together with lists of buildings and descriptions of real estate; * * * That the President of the Board of Commissioners be and hereby is directed and authorized to appoint and name six persons * * * who shall inventory and appraise all the personal property

and effects of the Dunning Institution, and make its report to the President of the Board of Commissioners and members at as early a date as possible, said persons and the cost of said inventory to be paid for out of the Dunning Institution Building Fund." On March 8, 1912, the president of the County Board appointed the plaintiff and Arch M. Campbell as building appraisers to do this work.

At this time there were two funds which had been appropriated by the County Board in its annual appropriation bill available for the payment of these services, (1) "for such building purposes as are not otherwise provided for, $25,000"; (2) "building purposes at Dunning Institution, $50,000."

The performance of the work is not in dispute. Plaintiff and Mr. Campbell, with necessary assitance, made the appraisement and reported the same to the County Commissioners. There is also evidence that the reasonable, usual and customary charges in Chicago for performing such services would amount to over $20,000. Defendant's only witness testified that this charge would be over $14,000, and it was admitted by defendant that 1% would be the usual and customary price, which would amount to nearly $10,000 for each appraiser. There was evidence that these appraisers had made an agreement with a committee appointed by the County Board as to their compensation, which was considerably less than the amount shown to be reasonable and customary.

There is no merit in the contention of the defendant that the Honorable H. Sterling Pomeroy, Judge of the City Court of Kewanee, Illinois, had no power and authority to sit as judge of the Superior Court of Cook County in the trial of this case. (See Wesely v. Estate of Pribyl, App. Court No. 20834, opinion filed November 15, 1915, and cases therein cited.)

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Neither is there force in the contention that the president of the Board of County Commissioners had no power or authority to appoint plaintiff and Campbell as expert building appraisers. The resolution cited above gave the president such power. In view of the request of the Board of Administration for a "detailed inventory of all property," it is evident that the County Board in its resolution passed in pursuance of that request, providing for the appointment of appraisers of all the property "and effects" of the Dunning Institution, intended to mean buildings and land and all other property of the Institution. It was the purpose of the resolution to comply with the request of the Board of Administration by furnishing an appraisal of all the property of the Dunning Institution of every kind, without exception. Cases cited where the president or agent of the County Board was not properly authorized to act for the Board are not in point. In the case before us there was ample authority in the president by virtue of the resolution.

We do not see how defendant can complain as to the evidence of an agreement between plaintiff on one hand, and the president of the County Board and a committee on the other hand, as to the rate of compensation. Even if defendant's objections were good, under the common counts of plaintiff's declaration he would be entitled to recover on a quantum meruit, and, as we have heretofore indicated, upon this basis he would be entitled to recover a larger amount than he claims or than has been awarded by the jury.

It was not error for the court to exclude testimony with reference to a custom of appraising buildings by estimating the cubical contents thereof. Plaintiff and his associates had been directed by the County Board, through its committee, as to the manner of doing their work, and the evidence is

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It was not error for the court to exclude testimony with reference to a custom of appraising buildings by estimating the cubical contents thereof. Plaintiff and his associates had been directed by the County Board, through its committee, as to the manner of doing their work, and the evidence is

that these instructions were followed.

We are of the opinion that the County Board by its resolution did not confer upon the president of the Board the power to let any contract; it merely directed him to perform a ministerial duty in making the appointment, and this the Board had a right to do. Gillett v. Logan County, 67 Ill. 256; Sexton v. County of Cook, 114 Ill. 174.

There is also a further answer to the points made by the defendant, which is that the defendant is estopped from claiming that plaintiff is not entitled to recover, for it has accepted the benefits of the services performed. It has been held many times that where a municipality has power to contract for services and such services have been rendered and the municipality has accepted the benefits thereof, it is bound to pay the reasonable value thereof. County of Coles v. Goehring, 209 Ill. 142, and cases therein cited. There can be no question of the power of the County to employ appraisers; hence, cases cited by defendant's counsel in which the municipality had no such power are not in point.

As we have above indicated, there was a valid appropriation made by the County Board of funds available for the services rendered. The payment could have been taken either from the appropriation of $25,000 "for such building purposes as are not otherwise provided for," or the $50,000 appropriation for "building purposes at Dunning Institution." The resolution of the Board provided that the cost of the inventory should be paid out of the "Dunning Institution Building Fund."

We find no error in the giving and refusal of instructions by the trial court, and we are of the opinion that the evidence as to the services of Campbell is sufficient. Plaintiff testified that Campbell "did the same with reference

that these instructions were confirmed.

In one of the opinions then the Company based by the reasonable fair and energy when the [illegible] of [illegible] power to lay any conference; in another the [illegible] minimum duty in making the regulations, and then the board had a right to do. [illegible] v. [illegible] Co., [illegible] 3d; [illegible] v. [illegible] of [illegible], 122 [illegible]. 1944.

There is also a further answer to the public made by the Commission, which is to the effect that [illegible] from claiming that a minimum is not available. A reason, for it may [illegible] the benefits of the [illegible] performance. It has been held that [illegible] a municipality has power to contract for [illegible] a [illegible] from [illegible] and the municipality has [illegible] the [illegible]. It is [illegible] to pay the reasonable [illegible] [illegible]. [illegible] of [illegible] v. [illegible], 300 Ill. 140, and [illegible] [illegible]. There can be no question of the power of the [illegible] to confer [illegible]; hence, based cited by defendant's counsel in a [illegible] the municipality has no such power [illegible] [illegible].

As we have shown indicated, there was a valid appropriation made by the [illegible] of [illegible] available for the service rendered. The payments could have been [illegible] from the appropriation of [illegible] for such building purposes as are not [illegible] provided for, or the [illegible] [illegible] "Utility [illegible] [illegible] The resolution of the [illegible] provides that [illegible] the investment should be paid out of the [illegible] [illegible] building fund."

We find no error in the ruling and [illegible] instructions by the trial court, and in view of the opinion that the evidence is so the service of [illegible] is [illegible], [illegible] [illegible] [illegible]

to the appraisal as I did." He also testified that no part of the $3,800 for which he was suing, one-half of which had been assigned to him by Campbell, had been paid. Payment is a matter of defense, and in the absence of evidence of payment it will be presumed that payment has not been made.

Under the evidence the jury was justified in returning the verdict, and we find no convincing reason for disturbing it. The judgment is affirmed.

AFFIRMED.

to the superintendent as I did." He then testified that, in spite of the $3,500 for which he was suing, one-half of which had been assigned to the Company, had been paid, "payment is a matter of defense, and in the absence of evidence of payment it will be presumed that payment has not been made."

Under the evidence the jury was justified in sustaining the verdict, and we find no reversible error in sustaining it. The judgment is affirmed.

AFFIRMED.

102 - 22040

RICHARD J. PREST,
Appellant,

vs.

CARMAN LAUNDRY SUPPLY CO.
and H. HINCHLIFFE,
Appellees.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

1991 I.A. 354

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Superior Court to recover compensation for injuries received while he was a passenger on a car of the Chicago Railways Company. He alleged that the defendant Carman Laundry Supply Company and H. Hinchliffe were in control of a certain wagon being driven along Des Plaines street at the crossing with Madison street, and that they so negligently managed the wagon that a collision occurred and plaintiff was injured. As directed by the court, the jury returned a verdict finding the defendants, Carman Laundry Supply Company and H. Hinchliffe, not guilty, and upon this verdict judgment was entered.

Plaintiff appeals to this court, assigning as errors matters going to the proceedings upon the trial. This court cannot consider such assignments, for the reason that there is before us no sufficient bill of exceptions. The certificate of the trial judge which is appended to the purported bill of exceptions recites that the foregoing "is a synopsis of the evidence offered or received on the trial of the foregoing entitled cause * * * which were all of the proceedings, other than evidence as above described, had on the trial of the foregoing entitled cause." As the document called the bill of exceptions not only does not purport to contain all

the evidence, but impliedly informs us that it does not, we must assume that there was evidence appearing upon the trial sufficient to justify the action of the court in directing the verdict.

There are no assignments of error on the common law record. In the absence of a proper bill of exceptions we cannot question the verdict. The judgment is affirmed.

AFFIRMED.

12 - 21533

GIOVANNI BATTESTA SOLDA,
Plaintiff in Error,

vs.

JOSEPH HANREDDY,
Defendant in Error.

ERROR TO CIRCUIT COURT OF COOK COUNTY.

199 I.A. 366

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This writ of error is prosecuted to reverse a judgment on a directed verdict for defendant entered in an action for personal injuries alleged to have been sustained by plaintiff Solda through the negligence of defendant Hanreddy, his employer.

Defendant was constructing a tunnel called the Hanreddy tunnel under State street south from Seventy-ninth street. The Parker-Washington Company had constructed a tunnel called the Parker-Washington tunnel from the north to Seventy-ninth street, which was separated from the Hanreddy tunnel by a narrow ledge of rock called "the connection," which it was intended to blow out. On the morning of the accident Powers was defendant's superintendent, Racker was his foreman, and Valortigera, called "Jim," was drilling boss; plaintiff was his helper and his brother Joe worked with him running a drill; Samuels was city engineer; Harrigan was assistant city engineer and all the work on the Hanreddy tunnel was done under his direction and supervision.

[(1)] The negligence alleged in each count is based on the allegation that there was an accumulation of gas in the Parker-Washington tunnel;

[(2)] That the defendant knew, or by the exercise of ordinary care might have known, that an accumulation of gas was dangerous and liable to produce the injury complained of when the opening was made between the two tunnels;

[(3)] That the plaintiff himself did not know and did not have equal opportunity with the master of knowing these circumstances.

[(4)] That the accident resulted from the explosion of gas accumulated in the Parker-Washington tunnel.

The accident occurred on the morning of October 30, 1908. The night before Harrigan told defendant's employees that there was water between the bulkhead in the Parker-Washington tunnel and "the connection" and that they should look out for the water when the connection was broken through. On the morning of the accident the men went to work as usual. Usually twenty-two holes were drilled and blasted every morning. First, six holes would be drilled at points in a circle near the middle of the face of the tunnel wall, all slanted, so that the inner points of the holes would be very close together, to force the debris out into the tunnel. Other holes were placed on each side of the first six holes, and all would be drilled before any shot was made. Dynamite was put in only part of the holes at one time. Sometimes a shot would blow out a hole and sometimes not. It was the duty of the drill boss to go in after each blast and see the effect of the shot, and his helper would go with him. After the drilling and before the shot would be fired they would go back about 400 feet from the face of the tunnel, where there was a switch in electric wires, by which the dynamite was exploded. They would hear the noise of the dynamite as it exploded, but they could not tell whether the rock had been thrown out. After waiting a few minutes until the smoke and dust were forced back from the wall by compressed air, they would go into the face and see if the shot had taken effect, carrying dynamite with them, and if it had taken effect they

would dynamite the helping holes. If it had not taken effect they would put more dynamite in the same holes that had been shot and again go back to the electric switch and explode the dynamite.

On the morning in question the wires were connected, the men went back to the switch, turned on the current and waited about half an hour for the water which they expected to come through the hole they thought would be made when the dynamite was exploded. When the water did not come for half an hour, they started to go to the face of the tunnel. Hacker walked in front, plaintiff second, and the drill boss third. Hacker, as usual, took a lighted torch with him. The plaintiff, as usual, carried with him a box of dynamite for the purpose of loading the helping holes in case the shot had not taken effect. When Hacker got within a few feet of "the connection" he saw that the shot had taken effect, and turned and so told plaintiff and the drill boss; just then an explosion occurred. At the time of the explosion plaintiff dropped the dynamite he was carrying and started to run. He testified that when he dropped the dynamite it exploded and knocked him down. The fire filled the tunnel to the point where he was and set his clothes on fire.

The cause to which plaintiff attributes his injury is the accumulation of inflammable gas in dangerous quantities in the Parker-Washington tunnel and the failure of the defendant to warn him thereof. In order to show negligence the plaintiff was required to prove -

First. That there was inflammable gas in dangerous quantities accumulated in the Parker-Washington tunnel.

Second. That the defendant knew, or by the exercise of ordinary care should have known, of the presence of

the gas, and that it was capable of producing injury.

Third. That the plaintiff did not know and did not have equal opportunity with the defendant of knowing thereof at the time he was injured.

Without proof of all three of these essentials there was no duty resting on defendant to warn plaintiff of the danger. Pinckley v. C. & N. I. R. R. Co., 246 Ill.370, 377.

There was no direct evidence introduced to show either that gas had accumulated in the Parker-Washington tunnel or that defendant knew that gas had so accumulated there. Both these elements were sought to be proved by circumstantial evidence, but the circumstances relied on to prove them were themselves mere presumptions and not shown by direct evidence.

Where circumstantial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves be presumed. A presumption cannot be based upon another presumption and made the basis of recovery.

A presumption of fact which the jury is warranted in drawing can arise only from facts actually proven by direct evidence. One presumption cannot be the basis for a second presumption; that is, a presumption of fact is not alone a legitimate foundation for a second presumption of fact. It cannot be said that the existence of a certain fact may reasonably be inferred from the evidence when the existence of another fact inconsistent with the first cannot be from the same evidence inferred with clear certainty. The evidence must point to the existence of some particular fact rather than to the existence of another fact inconsistent with the first, before it can be said that such evidence alone

tends to prove the existence of the first. Condon v. Schoenfeld, 214 Ill. 226. Starkie has well laid down this rule. (Stark. Ev. 57.) In inquiring how far the law interferes to limit the exclusion or admission in evidence of collateral circumstances tending to prove a disputed fact, he remarks: "in the first place, as the very foundation of indirect proof, in the establishment of one or more facts from which the inferences are sought to be made, the law requires the latter shall be established by direct evidence in the same manner as if they were the very facts in issue." Governed by this rule, the evidence did not legally tend to prove either that gas had accumulated in dangerous quantities in the Parker-Washington tunnel, or if it had, that the defendant knew or by the exercise of ordinary care could have known thereof. The evidence introduced, as well as the evidence offered and excluded, at most tended to show only that gas had been noticed in the Hanreddy tunnel in quantities sufficient only to make the men nauseated, but never in sufficient amount to make it dangerous for the men, or to the extent that it would take fire.

The trial Judge did not rule that circumstantial evidence was not competent and proper to prove the accumulation of gas in the Parker-Washington tunnel, but ruled that the fact that there had been gas in the Hanreddy tunnel in sufficient volume to make the men working in the tunnel sick, but not in such volume as to ignite from a lighted torch, was not competent to prove that inflammable gas came into the Hanreddy tunnel from the Parker-Washington tunnel. Plaintiff's counsel admitted that he could not prove that during the six months prior to the accident the gas in the Hanreddy

tunnel was of a character and volume that was likely to cause an explosion if a lighted torch was brought into the tunnel; and only offered to prove that the gas in the Lanredy tunnel had the odor of illuminating gas. There was, as has been said, no direct evidence of an accumulation of gas in the Parker-Washington tunnel, and plaintiff sought to prove that there was by circumstantial evidence; but the circumstances relied on were not proved by direct evidence, but were themselves left to inference from facts still more remote. The authorities above quoted clearly lay down the proposition that where circumstantial evidence is relied on to prove the existence of a fact the circumstances must be proved, and not themselves be inferred or presumed to exist.

The evidence did not tend to show that the defendant had knowledge, or by the exercise of ordinary care could have had knowledge, of the accumulation of gas. The presence of gas in the Parker-Washington tunnel is not proved by direct evidence, but is a mere presumption based on another presumption, and a presumption of fact is not alone a legal foundation for a second presumption of fact. Globe Accident Ins. Co. v. Gerisch, 163 Ill. 625.

On the question whether the master had any greater means or better opportunity to discover the accumulation of gas in the Parker-Washington tunnel than did the plaintiff, the evidence in the record, with the inferences reasonably to be drawn therefrom most favorable to the plaintiff, did not fairly tend to prove the existence of the dangerous gas, nor to prove knowledge thereof on the part of the master, nor to prove that the plaintiff himself did not have equal opportunity with the master to know thereof, and consequently the verdict for the defendant was properly directed. E. J. & E. R. R. Co. v. Meyers, 226 Ill. 558.

The Court did not err in its rulings on questions of evidence and on the evidence admitted properly directed a verdict for defendant, and the judgment is affirmed.

AFFIRMED.

45 - 21734

CHICAGO STEEL FOUNDRY COMPANY,
a corporation,
Defendant in Error,

vs.

ANDRESEN-EVANS COMPANY, a
corporation,
Plaintiff in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

199 I.A. 369

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This writ of error brings in review a judgment for $152.62 recovered by the Chicago Steel Foundary Company, plaintiff, against the Andresen-Evans Company, defendant, for the contract price of six Tray Lips for grab-buckets manufactured by plaintiff for defendant. The lips were made pursuant to a written order. The specifications so far as they are material ~~here are~~ were that "the lips are to be of vanadium cast steel, 35 to 45 per cent carbon ANNEALED, to be true to pattern, not warped * * * the metal in cutting edges, solid and of the best quality."

The contention of defendant was that the lips contained defects rendering them worthless and that they were not made according to the specifications contained in the order. Defendant also gave notice of a set-off and counter claim for $951. The contract provided that the lips should be made according to blue print and pattern furnished by defendant, and defendant on the trial admitted that they were so made. The lips were properly annealed and contained the specified amount of carbon and contained three to four per cent of vanadium. The only provision in the specifications as to the amount of vanadium in the lips is

that "lips are to be of vanadium cast steel, 35 to 45 per cent carbon ANNEALED." The lips contained the specified amount of carbon and were properly annealed and the amount of vanadium fixed by the custom of the plaintiff in the manufacture of its products was added to the steel in casting.

If the defendant in ordering the lips of the plaintiff judged for itself and elected in what manner and of what material they should be made, there can be no implication that the parties understood that the lips were to be made on the judgment and responsibility of the plaintiff. The lips were afterwards to be manufactured and if the defendant directed that they should be made in a certain shape or style and of certain ingredients, and they were made in conformity to such directions, the plaintiff is not responsible for any injuries consequent because of the failure of the lips to subserve the purpose for which they were designed, for the judgment and skill of the plaintiff was not in such case relied upon by defendant. The percentage of vanadiau to be contained in the steel of which the lips were made not having been specified, the duty of the plaintiff was to add the amount thereof fixed by the custom of plaintiff in the manufacture of its products. This was done and the defendant can not be heard to complain that a greater or less percentage of vanadium was not added. It received what it contracted for and under these circumstances the plaintiff is entitled to recover the contract price and is not liable for damages alleged to have been sustained by defendant.

What has been said disposes of the contention that the defendant was entitled to reduce plaintiff's damages by recoupment or to recover damages by way of set off.

The evidence is conflicting in regard to some of the material facts, but it does not appear that the finding was clearly against the weight of the evidence, and unless it were so we would not be justified in disturbing it. We are of opinion that the finding is justified and supported by the evidence.

The record is free from reversible error and the judgment of the Municipal Court is affirmed.

AFFIRMED.

49 - 21750

RICHARD W. CARTER,
Plaintiff in Error,

vs.

R. C. CRIST,
Defendant in Error.

ERROR TO THE MUNICIPAL COURT OF CHICAGO.

No. 21,750

199 I.A. 371

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

Richard W. Carter sued R. C. Crist in the Municipal Court of Chicago on the following written instrument:

"For value received, I hereby guarantee the payment of the rent and performance of the covenants by the party of the second part in the leases made and executed on the 20th day of November, A. D. 1914, and expiring on the 30th day of September, 1915, by and between..... and Mrs. Jessie E. Brown and Miss Lotta Edwards, on the land and building known as 1511 Lawrence avenue, in the City of Chicago, Illinois.

Witness my hand and seal this 20th day of November, A. D. 1914.

R. C. Crist (Seal)."

The Municipal Court struck the plaintiff's "More specific statement of claim" from the files and plaintiff electing to stand by the statement, judgment was entered for defendant, to reverse which this writ of error is prosecuted. In his "More specific statement of claim" plaintiff alleges that on the date of the instrument sued on he was the owner of a two-story building at 1511 Lawrence avenue, Chicago; that on said day he leased the first floor of said building to Jessie E. Brown and Lotta Edwards, described in said lease as party of the second part, from December 15, 1914, to the 30th day of September, 1916, for $1027.50, payable in advance at $45 a month the first year and $50 a month the second year; that on said day he leased the second floor of said building as a dwelling to said Jessie E. Brown and Lotta Edwards, described as party of the second part, from the first day of De-

cember, 1914, to the 30th day of September, 1916, for $770, payable in advance, at $35 a month; that on said day the defendant executed and delivered to plaintiff a certain written instrument, under seal, which is the instrument sued on. It states that Crist guaranteed the payment of the rent by said parties of the second part in the "leases made and executed November 20, 1914, and expiring September 30, 1915, by and between.....and Mrs. Jessie E. Brown and Miss Lotta Edwards of the land and building known as 1511 Lawrence avenue, Chicago."

The instrument sued on is vague and indefinite. The "More specific statement of claim" does not allege that the defendant Crist authorized the plaintiff or any other person to insert a name in the blank in the instrument and fails to bring the defendant within two of its terms; namely, the date of the expiration of the leases and the property which is covered thereby. The "More specific statement of claim" alleges that the leases expired September 30, 1916, while the instrument sued on states that the leases expired September 30, 1915.

In Fitzgerald v. Staples, 88 Ill., 234, it was held that a court of law has no right to presume contracting parties intended to insert in a written contract a provision other or different from that which the plain language used would indicate, and then give a construction to the contract which would only be legitimate if the contract contained the supposed omitted provision. A bond which recites that the principal obligor made a contract with the obligee to recieve from the latter certain teas and coffees, sell the same, pay over to the obligee the proceeds of sale, less the profits of the obligor each month, and make a complete statement each

thirty days, and, without any condition being expressed, concludes, "then this obligation shall be void," etc., creates no liability on the part of those executing the same.

The court properly refused to enter a default on plaintiff's "More specific statement of claim" because the leases therein described are not the leases set forth in the instrument sued on.

The court properly struck from the files the "More specific statement of claim" and gave judgment for the defendant, and the judgment is affirmed.

AFFIRMED.

6C - 21802

JOHN F. DEVINE, Administrator of the Estate of Nathan Collins, deceased, Appellee, vs. CHICAGO & ERIE R. R. CO. and CHICAGO & WESTERN INDIANA R. R. CO., Appellants.	APPEAL TO SUPERIOR COURT OF COOK COUNTY.

199 I.A. 373

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted to reverse a judgment for $2,000 recovered by plaintiff as administrator of Nathan Collins against the Chicago & Erie and Chicago & Western Indiana Railroad Companies for wrongfully causing the death of plaintiff's intestate.

The deceased was a switchman in the employ of the Belt Railway Company of Chicago and at the time he met his death was a member of a train crew engaged in the operation of a train of two cars and an engine on the tracks of the Chicago & Western Indiana Railroad Company. There were on the right-of-way six tracks numbered from the east 1 to 6, and west of track 6 two switch or lead tracks. Collins' train was to be moved north toward 37th street on track 6. A Chicago & Erie train came north on track 3, passed over a diagonal track between 38th and 39th streets to track 4, and there stopped until it got a signal to go to track 5. It passed over track 5 to the crossing from 5 to 6 near 38th street, the engine in front. The deceased got off from his train on the east side thereof about 50 feet north of 38th street, probably to step across track 6 and throw a switch. Kibling, his conductor, got off the train on the west side and threw the switch. Collins when last seen by Kibling was standing on the east side of his train, which, as has been

said, was on track 6. The Chicago & Erie train which had stopped at the crossing of the diagonal switch track and track 4 came north on track 5 and struck and killed Collins at a point about 50 feet north of 38th street.

Whether the bell was ringing was on the evidence a question of fact for the jury. The tracks were elevated and there were several gangs of workmen engaged in completing the work in the immediate vicinity of the place where Collins was struck, and a sand train was working on the west lead track. Collins, standing between tracks 5 and 6, gave the signal to his train to go ahead. The Chicago & Erie train was moving on a diagonal track and Collins could not tell from the direction of the train which track it was intended to go on. We think that if the Chicago & Erie engine was started and ran from the diagonal track onto track 5 and then on track 5 without ringing a bell, when Collins was standing between tracks 5 and 6, the jury might infer negligence on the part of those in charge of the train. I. I. & I. R. R. Co. v. Ostott, 212 Ill. 429.

Whether Collins was guilty of contributory negligence was, we think, on the evidence also a question of fact for the jury.

The Court did not err in refusing to give instruction 20 tendered by defendant.

The record is free from reversible error and the judgment is affirmed.

AFFIRMED.

91 - 21985

ALBERT W. RUDNICK, Administrator of the Estate of JAMES F. SCANNELL, deceased, Appellee, vs. CITY OF CHICAGO, Appellant.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

199 I.A. 375

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This appeal brings in review a judgment of the Circuit Court in favor of Albert W. Rudnick, administrator of James F. Scannell, deceased, for $5069.30 against the City of Chicago for compensation of the plaintiff's intestate, who was alleged to be a meter setter in the Department of Public Works of the City of Chicago.

Rudnick, Administrator of Scannell, vs. City of Chicago, No. 20897, not yet reported, was a proceeding in mandamus, in which a writ was awarded commanding the City to reinstate the defendant Scannell, then in full life, to the office of meter setter in the Department of Public Works of the City of Chicago. In that case it was held that no such office as meter setter existed in the Department of Public Works of the City of Chicago, and the judgment was reversed.

On the authority of that case we hold that plaintiff's intestate was not a meter setter in the Department of Public Works of the City of Chicago, and therefore was not entitled to recover for services alleged to have been rendered by him as a meter setter.

The judgment of the Circuit Court is reversed and judgment of nil capiat entered here.

REVERSED WITH JUDGMENT OF NIL CAPIAT.

100 - 22031

JACOB E. ZINK,
Appellee,

vs.

NATIONAL COUNCIL KNIGHTS AND LADIES OF SECURITY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

199 I.A. 379

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This writ of error is prosecuted to reverse a judgment for the plaintiff in an action in the Municipal Court by Jacob E. Zink, the beneficiary in a beneficial certificate issued by defendant, a fraternal benefit society, on the life of Martin Zink, a son of the plaintiff. The statement of claim states that the suit is brought by plaintiff as beneficiary on the beneficial certificate above mentioned; that Martin Zink died February 5, 1913, and was then a member of defendant society in good standing; that plaintiff made proofs of death and defendant refused payment, and that there is due $1916 and interest. The beneficial certificate sued on is a part of the statement of claim.

The defendant in its affidavit of defense stated that the application, beneficial certificate and by-laws of the society constituted the contract; that the insured had made false statements which he had warranted to be true; that one of such statements was that a sister had died of pneumonia, when in fact she had died of consumption; that none of his blood relatives had been afflicted with consumption, when in fact the sister above referred to had died of consumption; that engaging in the manufacture or sale of liquors was a prohibited occupation, and that the insured was engaged at such occupation at the

time of his death. The Court in the instructions to the jury stated that -

"Ordinarily, in a case such as this, the plaintiff has what we call the burden of proving his case by a preponderance of the evidence, but it is different in the case before us. The defendant admitted what we term the prima facie case of the plaintiff; he admitted that unless the defenses that the defendant relied upon are established by that degree of evidence which the law requires, that then the plaintiff should recover the amount sued for. That, therefore, changes the rule of law and throws the burden upon the defendant to establish its case, its defense, by a preponderance or greater weight of the evidence."

This instruction correctly states the law, but the Court refused to give defendant the right to open and close. In this the Court erred. The admission made by defendant threw the burthen of proof on defendant and gave to it the right to open and close.

"The plea of the general issue having been withdrawn by leave of the court, there remained only an affirmative plea throwing the burthen of proof on the defendant and necessarily giving him the opening and conclusion before the jury. This is the uniform practice and is consonant to sound principle. He who affirms a fact is bound to prove it. He is the actor and entitled to all the privileges of that position." Harvey v. Ellithorpe, 26 Ill. 416.

Plaintiff contends that the statements in the application and medical examination were not true, and that the judgment should be reversed without remanding. This contention cannot be sustained. Mrs. McCarthy and Mr. Bair were officers of the council of which the insured was a member, and knew the facts, knew that such statements were not true; but with such knowledge on their part the local council continued for eight years to collect assessments from the insured.

"The law is well settled in this state that the provisions of the by-laws of mutual benefit societies of this character may be waived by the society; that the local lodge or council of such society is the agent of the supreme lodge and may waive such by-laws by accepting dues and assessments with full knowledge of all the facts constituting a violation of the rules of the order, or by other acts and conduct of its officers and agents of such a character as to induce a belief on the part of the insured that the society does not intend to

exercise its right of forfeiture, but, on the contrary, recognizes the insured as a member of the society in good standing. (Jones v. Knights of Honor, 156 Ill. 113; Grand Lodge A. O. U W. v. Lachmann, 199 id. 140.)"

The question whether the conduct of the officers of local council was not such as to induce on the part of the insured a belief that the council did not intend to exercise its right of forfeiture, but on the contrary recognized the insured as a member of the society in good standing, was one for the jury. The court gave to the jury this instruction:

"Under the by-laws which form a part of the contract in this case, it became the duty of the defendant, whenever it came to its knowledge or the knowledge of its executive committee that a beneficiary certificate had been obtained by false representations, to at once inquire into the facts, and if they believed such charges to be true, to notify the accused member and subordinate council to which he belonged, of such charges, and direct the subordinate council should require the member to appear before the council for a hearing upon such charges, fixing the time and place in the notice given by the council to the member; or, the executive committee may, after being satisfied from an investigation that the charges are true, require the accused member to appear before such committee at such time and place as they shall direct in the notice to said member, and if the charges are found to be true, at the hearing, to order such beneficiary certificate at once to be cancelled. This is an affirmative action required to be done on the part of the defendant, and where affirmative action is required to be done, in order to avail itself of a certain viclation on the part of a member, it must prove that it has availed itself of that and has taken the affirmative action. And, you are now instructed, as a matter of law, that if you find from all the evidence before you that the defendant, through its agents, at any time prior to the death of the deceased, had obtained the knowledge that the representations as to the death of the sister, or as to the fact that there was no tuberculosis in the family, were false, and failed to take any action thereafter, and accepted the payments of assessments and dues, with full knowledge of those facts, that that would constitute a waiver on the part of the defendant of its right to insist upon that clause in its certificate that the plaintiff could not recover by reason of such false statements. But, of course, in order to constitute a waiver, a party would have to have full knowledge of the facts. One cannot be held to have waived anything if he did not know all the facts and circumstances about a condition."

This instruction is misleading. It is not the duty of the officers of a local council to notify the insured or hear charges in case knowledge that he has made false statements should come to them; that, under the by-laws, is the duty of the National executive committee. The instru-

tion is not based on or supported by the evidence and the giving of it was reversible error.

For the errors indicated the judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

117 - 22060

L. W. HUBBELL FERTILIZER COMPANY, a corp.,
Defendant in Error,

vs.

D. JACOBELLIS and ANTONIO TARALLO,
Plaintiffs in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

199 I.A. 381

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment December 10, 1914, against defendant Jacobellis and the same day prayed and was allowed an appeal to this Court on giving an appeal bond within thirty days with security, etc. The appeal bond was filed January 18, 1915, thirty-nine days after the rendition of the judgment. The bond was executed by defendant Jacobellis as principal and Antonio Tarello as surety, and recited the recovery of the judgment, the prayer by and allowance to defendant Jacobellis of an appeal, and provided that if Jacobellis paid the amount of the judgment, etc., in case the judgment was affirmed, the obligation to be void; otherwise, etc. The same day Jacobellis sued out of this Court a writ of error and gave a supersedeas bond in the usual form. April 19, 1915, the appeal was dismissed. This action was then brought on the appeal bond and judgment recovered, to reverse which this writ of error is prosecuted.

In our opinion the case of Reserve v. Clark, Jr., 115 Ill. 580, is conclusive against the contention of appellant in this case. In that case it was held, that an appeal from the trial court, to be effective, must be in conformity with the order allowing it; but it does not follow that an appeal bond filed not in accordance with the order

allowing the appeal is not obligatory upon the parties executing it. Where an appeal was allowed to two defendants upon their entering into bond, with security to be approved, and only one of them gave the bond, and the appeal was dismissed by this court, it was held that the parties who did execute the bond were liable on the same, and that they were estopped by the recital therein from denying that an appeal was taken. In this case, as in that, the language of the final order was: "It is therefore ordered by the court that the appeal be dismissed and that a procedendo be awarded." It may be admitted that no appeal was taken that would have affected the right of appellee had he seen fit to disregard it. The question is not whether the appeal was properly taken, for it is conceded that it was not; but the question is: Ought the appellant in a suit upon the bond be heard to say that no appeal was ever taken? The general rule unquestionably is, that the maker of a bond is bound by the recitals in it, whether they are true or false. In McConnel v. Swailes, 2nd Scam. 571, it was held that the dismissal of an appeal is equivalent to a legal and technical affirmance of a judgment of the court below, so as to entitle the party to claim a forfeiture of the bond and have his action therefor.

The Municipal Court decided the case correctly on the evidence presented to it, and the judgment is affirmed.

AFFIRMED.

22492

PAUL R. ELLGUTH,
Appellee,

vs.

EDWARD R. LITZINGER,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

199 I.A. 383

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

Appellee Ellguth as complainant filed his bill in the Superior Court in chancery against Edward R. Litzinger, appellant here. The defendant answered the bill, both parties filed affidavits, and the court, with the consent of the parties but in their absence, heard the statements of former Judge McEwen and incorporated such statements in the certificate of evidence.

The parties were engaged in the manufacturing business and the written agreement between them shows that they contemplated forming a partnership to carry on such business, but no partnership was actually formed. Litzinger advanced approximately $40,000. Ellguth became indebted to Smith & Biossat, and they obtained possession of and operated the plant, but were willing to surrender the same if repaid the amount advanced. Ellguth appealed to Litzinger and he agreed to purchase the plant for $5,000, which would pay Smith & Biossat the $3500 demanded by them, and made a contract with Ellguth to give his time and energy to the business, and should the business prove profitable and all indebtedness be paid then the $5,000 should be paid to Litzinger out of the profits, and in that case, or if Ellguth paid Litzinger $5,000, he would convey to Ellguth a one-half interest in the business and assets.

The business was not successful but grew worse,

and Litzinger concluded to wind it up; with this decision Ellguth was then satisfied, but later concluded to continue the business. The record shows that Ellguth had unsatisfied judgments outstanding against him and that Litzinger was solvent. January 13, 1916, Litzinger took exclusive possession of the plant and thereafter did not permit Ellguth to enter. The bill was filed January 17, 1916, and application for the appointment of a receiver made by Ellguth. The Court having indicated its intention to appoint a receiver, Litzinger, then in possession of the property and before the appointment was made, moved the Court that in lieu of the appointment of a receiver he be permitted to give a bond in such penalty as the Court might fix and with such security as might be satisfactory to the Court, and that said bond might be so conditioned as the Court might order or approve. This motion was denied. On February 4, 1916, the Central Trust Company was appointed receiver "to receive outstanding debts and effects of the business conducted by the parties at 3110 Morgan street, Chicago, in the pleadings in this case mentioned."

The complainant's interest in the business was very small and by the appointment of a receiver the business was greatly imperiled, and we think the Court erred in denying defendant's motion to be permitted to give a bond. The Court, proceeding on equitable principles in such a case, will mould and adopt its remedy so as to attain substantial justice without compromising the rights of any of the parties. High on Receivers, Sec. 9; Hopper v. Sandiner, 7 Abb. Pr. Rep. N. S. 56.

It was not, in our opinion, proper for the Court to hear the statements of Judge Scanlan privately, even with

the consent of the parties. Eagle-Gillman Co. v. Christopher, L. R. 4 C. Evi. 173. However, we see nothing in Judge McEwen's statements to warrant the reversal of the order.

For the refusal of the Court to permit the defendant to give a bond, the order is reversed.

ORDER REVERSED.

5 - 21268

WALTER J. ASHLEY, Defendant in Error, vs. E. F. MASTERSON, agent and attorney for ANNA DICKSON, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

199 I.A. 38

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

On April 14, 1916, on motion of the defendant in error the bill of exceptions in this case was stricken from the record.

Defendant in error now moves to affirm the judgment of the trial Court on the statutory record, abstracts and briefs of plaintiff in error.

In the condition of the record we are concerned only with the errors which may appear in the statutory record.

The errors assigned are argued under twenty-five different paragraphs. An examination of these paragraphs demonstrates that we are unable to decide any question raised or argued without reference to a bill of exceptions, and we have none before us. Whether the questions now argued were urged upon the trial court we cannot say, although in the absence of a bill of exceptions every intendment is in favor of the accuracy of procedure and the correctness of the judgment.

Finding no reversible error in the statutory record, the motion to affirm the judgment is allowed and the judgment of the Municipal Court is affirmed.

AFFIRMED.

22 - 21589

EDWARD BURNSTEIN,
Defendant in Error,

vs.

ALCAZAR AMUSEMENT COMPANY,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

199 I.A. 384

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

On a trial before the court plaintiff had judgment for $169, of which judgment defendant seeks this review.

Defendant operated in a Chicago theatre a place of entertainment known as the Great Northern Hippodrome, of which plaintiff was a patron. On several occasions when plaintiff patronized defendant's place of amusement he had a satchel with him which defendant's servants cared for, giving him an identification check, as is usual in places where articles of such a character are received for temporary safe keeping. On the occasion which gave rise to this suit plaintiff attended the place of amusement of defendant, paid the usual admission fee, and having with him a case or box delivered it to an attendant, at the request of such attendant, for safe keeping during the time plaintiff was attending the performance, and received an identification check therefor. On leaving the performance plaintiff presented the check to the attendant, who made a search for the article but could not find it, whereupon plaintiff brought this suit to recover its value.

We think the court might well find from the evidence, there being no countervailing proof, that the property was of the fair cash market value of the amount of the judg-

ment, and might further find that plaintiff had made prima facie proof that the servant receiving the article from him was acting within the scope of his authority in so doing. We further think that such conclusion is fairly inferable from the testimony of defendant's own witnesses. We are unable to discern from the proofs that plaintiff did or refrained from doing any act which in law would estop him from asserting the liability of defendant to respond to him for damages in failing to safely keep and return to him upon demand the property which he deposited with it for safe keeping.

This case is in no aspect of it comparable to Chesley v. Motor Vehicle Co., 147 Ill. App. 580. We find from the evidence that defendant was the bailee of the property of plaintiff, the subject matter of this suit, and we hold that in these circumstances the law required defendant, whether it was such bailee for reward or without reward, to take reasonable care of such property and that for its failure to do so it must respond in damages to plaintiff. Defendant, as the proof conclusively shows, was negligent in this regard, and it is therefore liable to respond in damages to plaintiff and make good the loss which he has sustained through such negligence. Defendant's objection that plaintiff failed to prove that defendant was in the control, management or operation of the Great Northern Hippodrome comes too late when made in this court, as it is, for the first time. Dorn v. Ross, 177 Ill. 425; Parmelee v. Annis, 54 Ill. App. 376.

The judgment of the Municipal Court does justice between the parties, and being free from reversible error either of law or fact is therefore affirmed.

AFFIRMED.

26 - 21618

MOSES OVENU, Defendant in Error, vs. ESTHER OVENU, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

199 I.A. 385

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

In an action of "Forcible Detainer" plaintiff had judgment for possession, in an attempt to reverse which defendant brings this writ of error. The facts are briefly that plaintiff claimed to be the owner in fee of a building consisting of two flats and three stores; that at the time in question the flat here involved was vacant and unoccupied, the other flat being tenanted, one of the stores being occupied by a son of plaintiff, Max, who had the keys to the vacant flat and kept them in his possession in the store which he occupied; that while Max paid no rent to his father for the store, he collected the rent from the tenant and paid it over to plaintiff, for whom he acted as agent for the whole building. To Max prospective tenants applied for the keys of the vacant flat so that they might inspect it, and to him defendant applied for and received the keys.

Plaintiff proffered a warranty deed from the husband of defendant, in which deed she did not join, conveying to plaintiff the whole of the property. Aside from this deed the evidence in the record conclusively shows that plaintiff was in the possession of the whole property by his tenant of the occupied flat and the possession by his son Max of one of the stores as tenant of his father and also his possession of the building as agent of his father.

By a subterfuge defendant obtained the keys to the flat from Max Ovenu, and in the stillness of the night surreptitiously, and without any leave or license from plaintiff or his agent and without any knowledge on their part of her intentions, moved into the flat with her furniture and children, and continued to retain possession from that time to the commencement of this suit and after demand upon her to vacate and surrender possession to plaintiff. While defendant claims the right to possession, she shows none. Her claim is that the property was her husband's and that it was bought with her money. But questions of title cannot be tried or adjudicated in a forcible detainer action. Sec. 2, chap. 57, R. S., provides, inter alia, that "The person entitled to the possession of lands or tenements may be restored thereto in the manner hereinafter provided:

First: When a forcible entry is made thereon.

* * * * *

Third: When entry is made into vacant or unoccupied lands or tenements without right or title."

Defendant's entry was forcible, such entry being without the consent or knowledge of the owner. An entry in such manner is in law a forcible entry. Such forcible entry was made into a vacant tenement and without right or title. In these circumstances plaintiff was entitled to invoke the statute supra to regain possession. Defendant, however, challenges the right of plaintiff to possession on the theory that he never had possession of the premises which were vacant. We think, however, as matter of law, plaintiff had possession of the whole building, including the vacant flat in controversy; for, notwithstanding he was not personally in

possession, he was in fact in possession by his tenants and the agency of his son Max, who had the keys to the vacant flat in dispute and retained them until defendant by a false pretense procured them from him.

In Muller v. Balke, 167 Ill. 150, it is held that a party making a deed to property owned by him but leased to tenants is a grantor in possession within the meaning of the statute supra, although he does not personally reside upon the premises, and that such deed is admissible in evidence, not to prove title, but to show that the plaintiff received a conveyance of the property involved from a grantor in possession.

Defendant invokes laches in plaintiff's failing to commence suit until seven months after service of notice demanding possession, and cites Douglass v. Whitaker, 32 Kan. 381. We think it a sufficient answer to say that no notice or demand for possession was necessary, as defendant's entry was unlawful and the detention without right. Miller v. Drexel, 37 Ill. App. 462; Hauman v. Burck, 91 ibid 48.

The judgment of the Municipal Court is in accord with the law and is therefore affirmed.

AFFIRMED.

38 - 21693

J. T. RUSSELL, Jr., and
EUGENE BUTLER, copartners
trading as RUSSELL & BUTLER,
Defendants in Error,

vs.

THE MAHAFFEY COMPANY,
a corporation,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

199 I.A. 388

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The action in the Municipal Court was for the amount remaining unpaid upon a judgment for $287.75 with interest and costs, in favor of plaintiffs and against defendant, rendered by the Circuit Court of Lauderdale County in the State of Mississippi. On a trial before the court the issues were found for plaintiffs and damages assessed against defendant for $153.86, and defendant seeks this review.

Defendant in its affidavit of meritorious defense interposes as its defense to the judgment that the Mississippi Court did not have jurisdiction to render against it the judgment which it did; that it had never engaged in business in the State of Mississippi; had never had any agent or representative in the State upon whom process could be served; that it never appeared in the action; that it never had any business transactions with the plaintiffs; that it was never indebted to the plaintiffs; that defendant was never within the jurisdiction of the Circuit Court of said Lauderdale County nor brought into nor made subject to its jurisdiction.

Plaintiffs offered in evidence a duly authenticated and exemplified judgment of the Lauderdale County

Circuit Court, and proved by the testimony of one of its attorneys that it had authorized his firm to appear and defend the suit; that they did so and from the first judgment appealed to the Mississippi Supreme Court and obtained a reversal; that the case was again tried and again unsuccessfully defended, and that the judgment in suit is the second judgment in the cause; that the same was in full force, that no further proceedings to review that judgment had been taken and that the defendant had paid its attorneys for all their services, both in the trial court and on appeal.

The testimony of Matthew and Samuel Mahaffey that defendant did not authorize any appearance in the case and did not appear in the cause is, in the light of the foregoing proofs, unconvincing. From the evidence we find that the Circuit Court of Lauderdale County had jurisdiction of defendant and of the subject matter of the suit, and that defendant was represented at the several trials by counsel having authority from defendant to so appear, and as matter of law we hold that the judgment of that court binds all the parties to it. Ambler v. Whipple, 139 Ill. 311; Lawrence v. Jarvis, 32 ibid 304. Where, as in the case at bar, the court of a sister State had jurisdiction of the person and of the subject-matter eventuating in the judgment in suit, the courts of this State are bound by that judgment and it is conclusive against all the parties to it. A court obtains jurisdiction of the person in various ways - by personal service of process, by the personal entry of appearance without process, or by an attorney of the court appearing and defending. In this case the record recites the appearance of defendant by attorney. This in itself affords presumptive evidence that the court

had jurisdiction of the person of defendant, the authority of the attorney being presumed. Added to this is the evidence of one of the attorneys that his firm was employed and that the suit was defended by it and that the services rendered in such defense were requited by defendant. All the elements necessary to give the judgment effect are present in the record. If it was error to receive this evidence aliunde the record, then the recital of appearance being in the record, the authority of the attorney appearing is presumed. Whittaker v. Murray, 15 Ill. 493.

The action in the Lauderdale County Circuit Court was attachment, and money in a local bank claimed to be that of defendant was garnisheed. The claim in that action is said to have been against a Wisconsin corporation of the same name as defendant, and it was contended that the record showed that such claim was contracted more than a year prior to the incorporation of defendant. Conceding such contentions to be true and that the defenses thus interposed might well have been made in the Lauderdale suit, they come too late when made in this suit for the first time. These defenses and all others which defendant might have had should have been made upon the trial in the Lauderdale court, and for the purposes of our decision we will assume that they were made and that they proved unavailing.

The novel point is raised, and objection made, that the learned trial judge read the depositions in the case before they were offered or read by counsel. We will venture to remark for the benefit of counsel that there is nothing which is secret so far as the judge is concerned in the records or files of the court in a cause, and for reading the depositions and informing himself of the whole case

before the trial the trial Judge is rather to be commended than censured.

The judgment of the Municipal Court being right is affirmed.

AFFIRMED.

83 - 21934

JOSEPH PTASZEK FOGEL,
Appellee,

vs.

DAVID H. FRITTS,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

199 I.A. 326

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an action on the case for assault and battery alleged to have been committed by defendant, the master, upon the plaintiff, his servant. On a trial before the court and a jury a verdict was rendered for $2500, from which $1200 was remitted upon the hearing of a motion for a new trial and a judgment entered for $1300, and defendant appeals.

No question arises upon the pleadings or the instructions of the court to the jury, but it is urged for reversal that the verdict and judgment are contrary to the weight of the evidence. The relation of master and servant had existed between defendant and plaintiff for ten years. Defendant denies the assault in his pleading and evidence.

From the testimony found in the record we gather that on the day of the assault plaintiff was wheeling moulding upon a truck in the shipping room of defendant near an alley; that defendant called to him that he was breaking the moulding and came running toward plaintiff and struck him in the region of the solar plexus and also struck him with a piece of the moulding; that as a result of this assault the plaintiff had stomach trouble of a very serious character and was incapacitated for work at all for more than three months and thereafter was only able to work infrequently, and was still suffering from his injuries at the

time of the trial. The stomach trouble was proven by the evidence of a medical man of standing and probity, who traced the trouble to the assault complained of. He testified that plaintiff's condition is known as paralysis or injury to the sympathetic system, a part of the solar plexus; that he had not been cured and that he was unable to cure him; that an ultimate cure depended upon plaintiff's constitution. This medical testimony defendant did not offer to rebut.

While plaintiff finds no direct support of his testimony detailing the assault, and defendant and his brother deny the assault, yet there are circumstances in the testimony of these two witnesses which the jury might well regard as corroborating in some essential particulars plaintiff's account of the assault. That there was trouble between plaintiff and defendant at the time plaintiff claims defendant assaulted him is patent from the testimony of all the witnesses, and we cannot with this evidence in mind say that the jury were not warranted in finding, as they did, from all the testimony and the other facts and circumstances in proof, that defendant was guilty of the assault charged, and we think they might reasonably so find. We cannot say that the judgment is contrary to the probative force of the evidence. The injuries resulting to plaintiff from the assault were serious and, so far as the medical witness was able to state, the prognosis is that they will be permanent. For such an injury it cannot be reasonably said that $1500 is an excessive award of damages.

The judgment of the Superior Court is affirmed.

AFFIRMED.

96 - 22019

EDNA COLEMAN,
Appellee,

vs.

ASHLAND CATERING COMPANY,
a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

199 I.A. 398

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of $5,000 entered upon the verdict of a jury in an action on the case for personal injuries.

Because we have concluded that the verdict and judgment are contrary to the weight of the evidence, the judgment must be reversed with a finding of fact upon the merits of the cause. We shall therefore confine this opinion to a reference to such of the facts as we regard pertinent to the conclusion to which we have arrived.

The suit was originally instituted against defendant and one William R. Walker but was afterwards dismissed as to Walker, with whom plaintiff had settled for $1000, Walker taking a covenant from plaintiff not to sue in consideration of the $1000. Defendants pleaded the general issue and after dismissal the defendant Catering Company filed additional pleas denying that it had control, possession or use of the doors, elevator, etc. At the close of all the evidence plaintiff asked and obtained leave to file an amendment to her declaration, striking out "the northwest corner of said Randolph street" wherever it appeared.

To the declaration as thus amended defendant interposed a plea of the Statute of Limitations, to which plea plaintiff demurred and the demurrer was sustained.

Defendant's plea of the general issue was allowed to stand to the declaration as amended.

The declaration consists of two counts. Both counts preliminarily aver that on November 10, 1912, defendant maintained in and on the public sidewalk on the north side of Randolph street, adjoining the Ashland Block, two trap doors, made of metal and level with and forming a part of the surface of said sidewalk, which were joined together, covering and furnishing access to an opening in said sidewalk beneath the premises of defendant and for its exclusive use and benefit; that said trap door was used by defendant for the purpose of taking in goods, provisions and other materials, and during all of said time it had control, possession and use of said sidewalk space underneath said doors and maintained thereunder a large freight elevator, which it operated by means of machinery, for raising and lowering goods through said trap door.

The first count proceeds to aver that about the hour of noon on the day of the accident William R. Walker, by his servant, for the purpose of consulting the servants of defendant about the delivery of fish, carelessly and negligently opened and lifted up for a distance of, to-wit, ten inches, one of said trap doors, which defendant had carelessly suffered and allowed to remain unfastened below, so that they might be raised up by any of its customers wishing in that way to deliver goods or messages to it; that said trap door was so raised immediately in front of plaintiff as she was walking on and along the sidewalk and when within six inches of the edge of the trap door, whereby she struck one of her legs against the edge of said trap door and was severely injured.

The second count after the inducement avers that during all of said time there was fastened to the under part of one of said trap doors a certain rod or piece of iron one foot long, which extended down perpendicularly when said trap doors were closed and which caused one of said trap doors to raise up on said sidewalk, leaving an opening between said trap doors, when said elevator was raised so high that said platform thereof struck against the said rod or piece of iron; that on the day aforesaid, about the noon hour, William M. Walker, by his servant, for the purpose of delivering fish to defendant, etc., then and there went upon said sidewalk and by a noise made on or above said trap door signalled defendant to raise the elevator, and immediately thereupon defendant, by its servant in that regard, in the sub-sidewalk space beneath the said sidewalk and trap doors, then and there carelessly and negligently caused said elevator to be raised until the platform thereof struck upon said iron beneath said trap door and caused said trap door to be raised, and at the same time Walker's servant took hold of the door and assisted in raising it, and that said trap door was so suddenly raised that plaintiff struck one of her legs against the edge thereof, as averred in the preceding count.

It is not disputed that defendant had a permit from the City of Chicago to use the space under the sidewalk, with the right to have access thereto by the two trap doors by striking against one of which plaintiff received her injuries. It is not contended that the trap doors were not in good working order and condition at the time of the accident. Neither is it claimed that the machinery underneath the trap doors, the elevator, etc., were not in good order and repair.

It is averred that these trap doors were not locked. In no view of the case nor from any testimony in

the record can it be said that the doors not being locked contributed in any way to the accident. Whether the doors were locked or not is immaterial, as it is clear from the evidence that these doors lay flat by their own weight and that the locking of them would not, under any view of the testimony, have added to their security.

The evidence fails to show that by any act of defendant or its servants occurring beneath the trap doors were the trap doors raised at the time of the accident, so that there was no direct negligence proven against defendant in the operation of the trap doors at the time of the accident.

Both counts aver that Walker, by his servant, raised the trap door so negligently and suddenly that plaintiff, without her fault, struck one of her legs against the edge of it and was injured; and in the second count it is charged that the defendant William M. Walker, by his servant, standing on the sidewalk, carelessly and negligently took hold of the trap door and assisted in raising it from the sidewalk at a time when plaintiff and other pedestrians were walking thereon, and that it was so suddenly raised that plaintiff, while in the exercise of reasonable care, while walking on the sidewalk and without her fault, struck one of her legs against the edge of the trap door, sustaining injuries, etc.

It will thus be seen that the negligence in both of these counts is primarily charged to be that of the servant of Walker. This we think clearly charges actionable negligence against the defendant Walker and the greater weight of the evidence sustains the theory of the declaration that the accident was caused by the negligence of the servant of Walker in raising the west trap door without due circumspec-

tion and care for the safety of passers-by. The man who had the best knowledge of what occurred is Healy, the servant of Walker, and we think that his account is sustained by a preponderance of the evidence. Healey's testimony was in its material parts corroborated by another eye-witness, George Kurmann, who had preceded Healey in the delivery of goods through the trap doors.

Healey, a servant of Walker, testified among other things that there was an iron ring in the door; that such ring was on the north end of the west door and that the west door had to be lifted up first before the other could be gotten up; that he lifted the west door about ten or eleven inches, when the plaintiff stepped on the door and he let the door drop because it was a pretty heavy door, and that as he did so plaintiff lost her balance and fell; that some one picked plaintiff up; that her dress had caught in the door; that Healey took hold of the ring and lifted the door up about half an inch so that plaintiff's dress could be gotten out; that when he lifted the door the first time he had not called for the elevator; that after the accident he came back and again lifted the door through which to put his load, and that when he then opened the door the elevator was below and he called for the servants of defendant to send it up.

Kurmann testified in corroboration of Healey that he saw Healey take hold of the ring of the door to pull the door up and that as he did so plaintiff came along and stepped on the door and knocked it out of Healey's hand; that the next he saw, plaintiff was on her knees and the door was closed; that as she stepped on the door it went down and her dress caught in it; that he afterwards saw Healey raise the doors up and send his goods down below, and that when the door was raised the elevator was where he had just previously

left it. ✓

We think this testimony inhibits any presumption that the door was raised by the ascension of the elevator. We think that the negligence charged and proven was primarily against the defendant Walker and that the negligence of Healey, the servant of Walker, caused to plaintiff the accident complained about. For this negligence the defendant is not responsible, and as defendant had no oversight or control over the conduct of the servants of defendant Walker, such negligence could not have been anticipated by the exercise of the greatest care on the part of the defendant or its servants.

Walker was an independent contractor, for the negligence of whom or of his servants defendant is not legally responsible. Defendant Walker bought his peace upon the payment of $1000 and obtained a written covenant from plaintiff not to sue. As the negligence charged is imputable to Walker, plaintiff has obtained all the satisfaction to which she is entitled under the law.

Plaintiff having failed to establish any actionable negligence against defendant and having released Walker from any further liability, has exhausted her remedy for further damages.

The judgment of the Superior Court is reversed, with finding of fact.

REVERSED WITH FINDING OF FACT.

(Over.)

96 - 22019 FINDING OF FACT.

The court finds as matter of fact that defendant is not proven by the evidence in the record to be guilty of the negligence charged against it in plaintiff's amended declaration.

101 - 22037

KATHERINE M. HEINEKE,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

199 I.A. 399

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment against it of $2,500 entered upon the verdict of a jury in an action for personal injuries. This is a case of passenger against carrier. Plaintiff was a passenger upon the electrically propelled car of defendant.

The declaration charges two acts of negligence against defendant - first, that it negligently permitted the aisle in the car to be obstructed by a valise or suit case. and, second, that while the car was in motion and plaintiff was seeking a seat defendant carelessly and negligently caused the car to start forward or to jerk; that as a result of such starting or jerking plaintiff was thrown forward and tripped against the suit case and thrown down upon the floor of the car and injured. Defendant says this is what is known as a blind case, meaning thereby that defendant had no knowledge whatever in relation to the accident complained about, and consequently no opportunity to give evidence either in support or denial of plaintiff's claim.

The testimony found in the record substantiates plaintiff's claims both as to the negligence charged and the injuries suffered by her as a consequence of such negligence. The jury from the evidence might reasonably find defendant

guilty of the negligence charged and that plaintiff was injured to the amount awarded by its verdict. As to the negligence charged defendant offered no testimony rebutting the case made by plaintiff's evidence. The only testimony offered in defense was that of physicians examined hypothetically concerning the extent of plaintiff's injuries. As to the medical testimony, we cannot say that the finding of the jury was contrary to its probative force. It therefore follows that unless there are reversible errors in procedure the judgment must be affirmed.

Defendant argues at some length that it is not liable under the facts in the record to respond in damages to plaintiff; that no negligence is inferable against it from the fact of the car jerking in its progress or the presence of the suit case in the aisle of the car and the resulting fall and injury to plaintiff, and cites many authorities in an attempt to sustain these contentions. We think the whole question is decisively met contrary to defendant's contention in West Chicago Street R. R. Co. v. Nash, 166 Ill. 528. This may be designated as a "jerk and satchel" case. It presents all the elements of fact found in the instant case, which are tersely stated in the court's opinion thus: "Her contention was that the car started with a violent jerk before she was seated, causing her to stumble and fall over a satchel which obstructed the aisle, and that by the fall her left arm was broken and other injuries inflicted." The court not only affirmed the judgment of the trial court, which had theretofore been affirmed by this court, but assessed damages under Sec. 23, Chap. 33 R. S.,

[illegible]

because the appeal was adjudged to have been prosecuted for delay. A presumption of negligence is said in Chicago City Ry. Co. v. Hood, 163 Ill. 477, to arise in a case of the "sudden jerk" of a train as being a cause within the control of the carrier.

An examination of the learned trial Judge's rulings on the evidence does not disclose any error calling for a reversal. The remarks of the court complained about were not prejudicial to defendant; moreover, they were fairly warranted by the action of counsel for defendant, who constantly failed to submit to the rulings of the court. The arguments of counsel contended to have been improper were fairly within the latitude which law and practice permit. Counsel do not contend that any improper remarks concerning any of the evidence regarding the accident were indulged. Such remarks, if it may be said any were made, were restricted to the testimony of defendant's medical expert witnesses and we cannot say in view of all the evidence in the case that they injuriously affected any right of defendant. The amount of the verdict does not justify any inference of prejudice or passion on the part of the jury.

The whole case considered, the jury were sufficiently and accurately instructed upon the law in every material matter involved. They were amply instructed at the instance of defendant upon its theory of defense; eleven out of twenty-four instructions tendered by defendant being given, while four instructions asked by plaintiff were given. Defendant's requested instructions 2, 4, 6, 7 and 10 were properly refused, as the jury were sufficiently instructed upon defendant's theory of defense without them, and a multiplicity of instructions oftentimes tends to confuse than to enlighten the jury. It is not error to refuse in-

structions which state correct principles of law where the jury are sufficiently instructed without them. The criticism of plaintiff's instruction 11 is finical. We think the term "reasonably consistent with the practical operation of its road" is an inclusive phrase contemplating not only the "mode of conveyance adopted by the carrier," but the power of propulsion and all else which enters into the practical operation of the road. This instruction has been approved in I. C. St. Ry. Co. v. Frombzinski, 185 Ill. 24; Jones v. Johnson, 186 ibid. 285; Hatcher v. Quincy Horse Ry. Co. 272 ibid 347.

We find no reversible error in this record and the judgment of the Circuit Court is affirmed.

AFFIRMED.

22508

ALLEANZA ITALIANA, a corporation, Appellee, vs. CARMELA PAPA, Appellant.	INTERLOCUTORY APPEAL, SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The complainant, Alleanza Italiana, is a benevolent association which insured the life of Vincenzo Di Bernardino and issued a certificate for $1,000 thereon, in which the defendant, Carmela Papa, the appellant here, was named as beneficiary. Vincenzo Di Bernardino died and appellant commenced suit in the Municipal Court of Chicago against complainant and obtained judgment against it for $1,000, the amount of the certificate.

Vincenzo Di Bernardino left a son him surviving, the defendant Tarquinius Di Bernardino, who asserts a claim and interest in the money due upon the certificate, and W. M. Johnston and W. S. Johnston claim $65 of that amount.

Complainant filed the bill of interpleader in this case, made all the claimants to the fund parties and offered to bring the amount of the certificate into court to be paid out to such of the parties as the court might on a hearing find entitled to it. Appellee prayed that the enforcement of the judgment be enjoined until the rights of the parties could be adjudicated, and the court granted the injunction prayed, from which order this appeal is prosecuted.

The injunction was granted upon the face of the bill, there being no other pleading in the record at the time than the verified bill. In our decision we do not pass upon the sufficiency of the bill or whether it would be obnoxious to a demurrer if one were interposed. We think, however, upon principle, that a bill of interpleader in the nature of the one found in the record may be maintained where there are conflicting claimants to the money involved, notwithstanding one of the claimants may have prosecuted his claim to judgment, and that equity will restrain the enforcement of the judgment until it can adjudicate upon the conflicting claims.

We cannot say, under the facts stated in the bill, that the injunction restraining temporarily the enforcement of appellant's judgment was improvidently granted. In Fowler v. Lee, 10 Gill & Johnson's (Md.) 358, where a similar question was involved, the court, after denying the relief sought by an injunction restraining the collection of a judgment, which the moving party feared he might have to pay twice, said: "If such was his apprehension he has not relied on it as a ground of relief; and if he had, it was his duty to have filed a bill of interpleader against such representatives and the appellee and paid the debt into court to be held for the benefit of the party showing his right to receive it." The complainant in this cause has offered to pay the $1,000 into court when requested, and may therefore at any time be compelled to do so by an appropriate order of the court and, should it fail to comply with such order, suffer the dismissal of its bill. We do not pass upon the right of the Johnstons to be awarded any part of the money involved on their claim or the right of complain-

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action at law, and that equity will restrain the en-
forcement of the judgment until it can adjudicate upon the
validity of claims.

We cannot say, under the facts shown in the
bill, that the injunction restraining temporarily the en-
forcement of creditors' judgments was improvidently issued.
In United v. Lee, in 124 U. S. (p.) 644, where a
similar question was involved, the court, after stating the
relief sought by an interpleader restraining the enforcement of
a judgment, which the court finally issued in favor of the
defendant, said: "If such was its application, it was not
relief on it on a ground of relief; but if it was, it was
his duty to have filed a bill of interpleader against the
representatives and the appellee and pray the aid of the
court to be made for the benefit of the party asking the
right to receive it." The complainant in this case has
offered to pay the $1,000 into court when required, and may
therefore at any time be compelled to do so by an appropriate
order of the court and, should it fail to comply with such
order, suffer the dismissal of its bill. We do not pass
upon the right of the defendants to be restored any part of
the money involved on their claim on the ground of mutualism

ant to deduct or to receive credit for its attorney's fees or costs, or any other question involved save the one question of the propriety of the court's granting the restraining order, the subject-matter of this appeal.

The injunctional order appealed from is affirmed.

AFFIRMED.

123 - 21087

THOMAS W. SKAREN, doing business as THOMAS W. SKAREN & COMPANY, Defendant in Error,	ERROR TO MUNICIPAL COURT OF CHICAGO.
vs.	
JACOB STRAUSS AND BERTHA STRAUSS, Plaintiffs in Error.	

199 I.A. 403

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

By this writ of error it is sought to reverse a judgment for $325.00 in favor of defendant in error (plaintiff below), against plaintiffs in error (defendants below).

Plaintiff's claim was for a commission of 2½% on $13,000.00 for obtaining a purchaser for the premises known as 2011 West Madison street, Chicago, Illinois, owned by the defendants.

Plaintiff's statement of claim charges that both defendants had requested plaintiff to secure a purchaser for the property in question, and testimony in support of that allegation was introduced. Defendants, in their affidavits of merits, denied that they had either jointly or severally requested plaintiff to secure a purchaser for the premises, and endeavored to

introduce testimony to substantiate this contention.

On behalf of the plaintiff, two witnesses, - the plaintiff himself, and one George Lynn,- testified that Mr. Strauss, as well as Mrs. Strauss, had requested plaintiff to secure a purchaser. On behalf of the defendants, Jacob Strauss denied that he had ever had any conversation with plaintiff or anyone from his office with reference to the sale of the property involved in this controversy, and that he had ever requested plaintiff to secure a purchaser for the property. There was also offered the testimony of Mrs. Strauss for the purpose of denying alleged conversations with Lynn and with the plaintiff, wherein she requested plaintiff to secure a purchaser. Objection was made to her testimony for the reason that she was the wife of Jacob Strauss, hence not a competent witness. The objection thereto, which was based upon sec. 5 of ~~our~~ the Evidence Act, ch. 51, R. S., was sustained, and the exclusion of this offered testimony is urged by defendants as cause for reversal; in fact, it is the only point urged on behalf of the defendants.

Under the common law, no parties in interest were competent witnesses. This disability was removed by sec. 1 of our Evidence Act, supra. However, sec. 5 of said act continues this disability with reference to husband and wife, with certain exceptions therein provided. Sec. 5 of the Evidence Act, supra, provides as follows:

> "No husband or wife shall, by virtue of section 1 of this Act, be rendered competent to testify for or against each other as to any transaction or conversation occurring during the marriage, whether called as a witness during the existence of the marriage, or after its dissolution, except in cases where

> the wife would, if unmarried, be plaintiff or defendant, or where the cause of action grows out of a personal wrong or injury done by one to the other or grows out of the neglect of the husband to furnish the wife with a suitable support; and except in cases where the litigation shall be concerning the separate property of the wife, and suits for divorce; and except also in actions upon policies of insurance of property, so far as relates to the amount and value of the property alleged to be injured or destroyed, or in actions against carriers, so far as relates to the loss of property and the amount and value thereof, or in all matters of business transactions where the transaction was had and conducted by such married woman as the agent of her husband, in all of which cases the husband and wife may testify for or against each other, in the same manner as other parties may, under the provisions of this Act: Provided, that nothing in this section contained shall be construed to authorize or permit any such husband or wife to testify to any admissions or conversations of the other, whether made by him to her or by her to him, or by either to third persons, except in suits or causes between such husband and wife."

Under the foregoing, the wife may testify in all cases where, if unmarried, she would be either plaintiff or defendant; and furthermore, in cases where the litigation concerns the wife's separate property, also in all matters of business transactions wherein the wife acted as agent of the husband.

It is an admitted fact in this case, that the defendants were the joint owners of the property in question, plaintiff's action being based upon this theory and defendants making no denial thereof. If Mrs. Strauss had been a joint owner of this property, as an unmarried woman, she would also have been a defendant in this action. Moreover, her interest in this property must be considered separate, and therefore her testimony was competent under the exceptions in the statute.

Plaintiff relies upon Hyman v. Harding, 162 Ill. 357, and Thomas v. Anthony, 261 Ill. 288, as supporting the ruling of the court below in the case at bar. Defen-

dants contend that these two decisions do not apply, and cite Kelly v. Hale, 69 Ill. App. 668, Vercler v. Jansen, 96 Ill. App. 328, and Thorne v. Anthony, 179 Ill. App.463, the latter having been reversed in 261 Ill. 288. In Vercler v. Jansen, supra, as in the case at bar, both the husband and the wife were made defendants. In that case also, as in the case at bar, conversations had with the wife were testified to on behalf of the plaintiff, and when an offer was made to introduce testimony by the wife to controvert such evidence, objection thereto was sustained, on the ground that the wife was incompetent, under sec. 5 of the Evidence Act, supra. Counsel for plaintiff in that case also relied upon Hansen v. Harding, supra, and the court, in construing that decision, stated, p. 330:

> "Upon the trial, Mrs. Harding, who was co-defendant with her husband, was permitted to testify against her husband, over his objection, the object of the testimony being to show that the ring was a wedding ring and that preservation of the same fell under a different class of expense from the purchase of an ordinary ring, and thus a charge against the husband. She did not seek to testify in her own behalf and there was nothing in her testimony which tended to exonerate her from the debt. The court therefore held that the testimony was incompetent and erroneously admitted." (Italics ours.)

and held that that case did not control, but that each defendant should have been permitted to testify in his or her own behalf; and the court went on to state, p. 331:

> "It is peculiarly unjust to permit witnesses for appellees to testify as to conversations with each of the appellants at times when the other was not present and then to refuse to allow that appellant to come upon the witness stand and deny such conversation."

We are of the opinion that the court, in Vergler v. Jensen, supra, correctly distinguished the case of Hyman v. Harding, supra, in arriving at its conclusion.

Nor can we regard the decision of our Supreme court in Thomas v. Anthony, supra, as authority in the case at bar. While we realize that the court in that case said that "where the husband and wife are jointly sued upon a contract liability, the wife is not a competent witness," citing Hyman v. Harding, supra, yet there was no such issue in that case, as the husband and wife were not joint defendants, the wife not being a party to the action. Therefore that statement by the court must be regarded as obiter dictum; moreover, as we read Hyman v. Harding, supra, no such holding was there made. Furthermore, in neither Hyman v. Harding, supra, nor Thomas v. Anthony, supra, was it contended nor was any evidence adduced showing that the wife was a competent witness under section 5 of our Evidence Act, supra. In the instant case, the evidence shows that Mrs. Strauss was properly a defendant, and that the suit affected her own property, and that she was, therefore, clearly a competent witness, and the court erred in excluding her offered testimony.

Nor can this erroneous ruling be considered harmless. The important question was whether or not the defendants had requested the plaintiff to secure a purchaser for the property. There was a sharp conflict in the evidence on that question. While the jury had before them the contradiction by Mr. Strauss of having made any

request, yet so far as Mrs. Strauss was concerned, the testimony of the plaintiff that she had requested him to secure a purchaser, stood uncontradicted. This was because of the ruling of the court denying her the right to so contradict plaintiff's testimony. Under the facts and circumstances, we must regard the ruling of the court of such character as to necessitate a reversal of the judgment.

For the reasons hereinabove assigned, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

129 - 21103

CHARLES A. MICHALAK,

Defendant in Error,

vs.

S. J. TOMKIEWICZ,

Plaintiff in Error.

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

199 I.A. 405

MR. PRESIDING JUSTICE FAM delivered the opinion of the court.

This is an action in trespass, brought by defendant in error (plaintiff below), against plaintiff in error (defendant below), for damages for an alleged assault made upon plaintiff by defendant. Upon a trial of the cause, the jury returned a verdict for $500, and from a judgment on this verdict defendant prosecutes this writ of error.

Defendant contends that the court erred in giving on behalf of the plaintiff, instructions 2 and 3, the subject-matter of which was the question of damages; and further contends that the verdict, under the facts and circumstances, showed that the jury allowed the plaintiff, exemplary or vindictive damages, when none should have been allowed, and therefore the damages were excessive.

At the time of the assault (February 5, 1912), defendant was the owner of a drug store located at 2178 South Throop street, and had in his employ the plaintiff, who entered his service as an apprentice on the 5th day of June 1911. Plaintiff, in the course of his employment,

had occasion to sell postage stamps, which were usually kept in a drawer not under lock and key. The money for the sale of stamps was placed in the drawer. On previous occasions there had been shortages in the stamp drawer, which led to disputes between plaintiff and defendant. On the day of the assault, a similar discussion had arisen between them, and the plaintiff was summarily discharged. [It would serve no useful purpose to set forth in further detail the circumstances leading up to the assault and the character thereof, as we are satisfied, from a careful examination of all the evidence in the case, that the jury were warranted in arriving at the conclusion that defendant had assaulted plaintiff without provocation; and we are also satisfied that the jury were warranted in awarding exemplary or vindictive damages.] Defendant does not urge that the verdict is against the weight of the evidence, but contends that as the testimony was conflicting, the jury should have been "correctly instructed as to the rule of damages applicable to the case." [We have carefully considered the argument made by defendant with reference to instruction number 2, together with the authorities cited in his argument, and are of the opinion that his contention in regard thereto is without merit.]

Defendant also complains of instruction number 3, wherein the jury were told that in assessing punitive or exemplary damages, they had the right to take into consideration the pecuniary circumstances of the defendant. He contends that this instruction should not have been given, because there was no evidence offered by plaintiff

with reference to the pecuniary condition of the defendant. We cannot concur therein. Plaintiff testifies that defendant was the owner of a drug store where he (plaintiff) had been employed; and that defendant was president of the Polish National Daily. Defendant testified that he operated and owned a drug store; that he had been in the drug business for 20 years, and further stated that he was in the newspaper business, and that he was president of the Polish National Publishing Company. He contends, however, that this is not such evidence as would warrant a conclusion as to his pecuniary condition. While it is true, the value of the defendant's interests was not stated, yet it is a fair inference from the evidence, that the drug store had a substantial value, and moreover, by reason of defendant's being president of the Polish National Publishing Company, that defendant had more than a nominal interest therein. Defendant was entitled, in view of this evidence, to give details with reference to the value of the drug store or his interest in said publishing company. He did not see fit to do so. We are of the opinion that the jury were properly instructed on the question of damages.

Defendant finally contends that the damages allowed are excessive. While we concur in this contention, we are of the opinion that they are not so excessive as to show prejudice on the part of the jury in allowing them, so as to require a reversal of the judgment. The character of the damages sought to be recovered in this case is well described by Mr. Justice Breese, in Walker v. Martin, 43 Ill. 508, 516:

> "Though damages in such cases are very much a matter of sentiment and feeling, and no rule can be prescribed by which they shall be measured, still, the judgment of the jury must be exercised in every case, and all the circumstances duly weighed by them."

An examination of the record impels us to the belief that the plaintiff's conduct at the time of the assault, was not entirely decorous, and not entirely free from censure; and while such conduct was not sufficient to warrant or excuse the assault, yet it should have been considered in mitigation of the damages.

We have already held that the jury were warranted in allowing exemplary damages, but we are of the further opinion that the amount of damages allowed is excessive. Therefore, if plaintiff will remit from the judgment the sum of $200 within ten days, the judgment will be affirmed; otherwise it will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR, OTHERWISE

REVERSED AND REMANDED.

167 - 21144.

WILLIAM LIBMAN,
Plaintiff in Error.

vs.

CAROLINA BAATZ,
Defendant in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

199 I.A. 407

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

This was a fourth class action to recover damages for an alleged breach of a written contract entered into by and between plaintiff in error (plaintiff below), and defendant in error (defendant below), for the sale of certain realty owned by defendant, the premises in question being situated at and known as 3215 Ogden avenue in the City of Chicago. The court found the issues for the defendant, and having entered judgment thereon for costs, plaintiff has sued out this writ of error.

The statement of claim sets forth the contract of sale, and alleges that plaintiff's claim is for damages sustained through the failure on the part of the defendant to carry out the agreement; that plaintiff was at all times ready, willing and able to carry out said contract and did comply with every particle of said agreement; that he demanded from defendant that she likewise perform said contract, but that said defendant wholly refused, failed and neglected to do so, to plaintiff's damage of one thousand dollars ($1,000).

The affidavit of merits alleged by way of defense, that plaintiff had, through his attorney, informed defendant that he would not carry out his part of the contract as he felt he was paying $2,500 more than the premises were worth; that while plaintiff's attorney returned the abstract of record, he did not cancel the contract; that the plaintiff's attorney stated she must come and settle with him whenever, in the future, she obtained a purchaser for said premises; that defendant was afterwards notified that unless the $200 earnest money was returned, plaintiff would instruct his attorney to place the said contract on record, so as to cloud defendant's title and thus force her to return the earnest money; that defendant, to prevent clouding the title, transferred the property to her daughter; that when plaintiff discovered the transfer, he, on October 31, 1913, notified defendant that he was ready to carry out the said contract; that by arrangement between her attorney and that of plaintiff, the parties met on November 4, 1913, at 2 o'clock P.M., in the office of plaintiff's attorney; that plaintiff's attorney then stated to defendant that he had been informed that she had transferred the premises to her daughter and that plaintiff would not take same; that thereupon her attorney made the following offer: that if plaintiff would place the sum of forty-eight hundred dollars ($4,800) and the notes and trust deed securing said notes on said property in escrow with the Chicago Title & Trust Company, she would place the warranty deed from her said daughter to the plaintiff in escrow, pay the escrow fees, and also pay for having the abstract brought down to date showing a clear and good title to the premises in her said daughter, Clara D. Beatz, but this the plaintiff absolutely

refused to do.

On the trial of the case before the court without a jury, each party introduced testimony tending to sustain the contentions made respectively in the statement of claim and affidavit of merits. While plaintiff urges several reasons why the judgment should be reversed, the greater part of his brief and argument is devoted to a discussion of the evidence, urging that the judgment is clearly and manifestly against the weight thereof. The testimony adduced on both sides resolved the issues into one question of fact, viz., Who breached the contract? The determination of that issue centered around the fact that defendant, after the contract had been entered into, transferred the property to her daughter.

Plaintiff contends that this fact supports his evidence, that defendant refused to carry out the provisions of the contract as requested by him. Defendant's testimony, however, was to the effect that, plaintiff, having refused to close the deal, and having threatened to place the contract of record unless the earnest money was refunded to him, in order to keep the title clear, she transferred the property to her daughter.

There were many other facts and circumstances put in evidence. The court, in finding for the defendant, evidently believed the testimony offered on behalf of the defendant on the issue as to who breached the contract,- the controlling issue in the case. We have made a careful review of the entire record, and after due consideration of all the evidence, cannot say that the finding of the court is clearly and manifestly against the weight thereof. In

this view of the case, the questions of law raised by plaintiff have no application.

Finding no reversible error in the record, the judgment will be affirmed.

AFFIRMED.

188 - 21159.

PEOPLE OF THE STATE OF ILLINOIS, Defendants in Error,	ERROR TO CITY COURT, CHICAGO HEIGHTS.
vs.	
MATT BUCONICH and JOHN BUCONICH, Plaintiffs in Error.	

199 I.A. 410

MR. PRESIDING JUSTICE FAM delivered the opinion of the court.

By this writ of error it is sought to reverse an order finding plaintiffs in error (defendants below), guilty of contempt of court for violation of an injunction order.

On or about the 23rd of September, 1914, a bill was filed by Lee Hook and Peter Cassazza, the relators herein, seeking to restrain defendants and others from conducting a house of ill-fame in the City of Chicago Heights. On September 24th an injunction was issued, restraining defendants from using or occupying said premises for the maintenance of a house of ill-fame. Defendants were duly served with a writ of summons and the writ of injunction, on September 26th.

On October 10th a petition was filed by the relators which set forth, inter alia, the filing of the original bill, the issuance of the temporary writ of injunction; service of a copy thereof upon each of the defendants; and that

since the issuance thereof and the service of copies upon the defendants, said defendants had continued conducting said premises as a house of prostitution. Said petition prayed for an attachment to issue against the defendants for contempt of court, and sundrie interrogatories for the defendants to answer. A rule was entered upon defendants to show cause why they should not be punished therefor, and defendants having on October 26th entered their appearances, the cause proceeded to a hearing.

On behalf of the prosecution seven witnesses testified on direct examination and two were called in rebuttal. Without dilating upon their testimony, it will suffice to say that their testimony supported the allegations set forth in the petition. The only testimony given on behalf of the defendants, was their own testimony which was to the effect that neither of them had, since the issuance of said injunction and the service thereof upon them, conducted a house of ill-fame on the premises in question for the practice of prostitution; that at most, they entered the said premises only two or three times, and then only for the purpose of getting wearing apparel and other property belonging to them. There were several witnesses called in rebuttal, whereby some of the statements made by defendants in their testimony were contradicted. At the conclusion of the hearing the court found both defendants guilty, imposing a fine of $100 and costs, and sentencing them to six months in the Cook County jail.

In urging a reversal, defendants contend, first, that the keeping of a house of ill-fame constitutes a crime

under ~~our~~ the statutes, and that the filing of the bill for an injunction was in effect an attempt to punish crime, and that a court of equity is without jurisdiction so to do. As we read the bill, however, this contention is without merit. The bill charged that defendants were keeping a house of ill-fame, in violation of the laws of ~~our~~ the state; that defendants had been repeatedly arrested, in some instances having plead guilty and in others being found guilty; that at the time of the filing of said bill, like prosecutions were pending; that these acts were detrimental to the interests of the community, subversive of public morals; that the maintenance of the premises as a house of ill-fame constituted a common nuisance, resulting in a lowering of the standard of morality in the neighborhood, and a depreciation of property values; and that the laws of ~~our~~ the state although providing for punishment in such cases, did not prevent defendants from conducting such a place. A bill of this kind must be regarded not as an attempt to punish for a crime, but to abate a continuing nuisance, and it has long been held to be within the jurisdiction of a court of equity to enjoin the maintenance of a common nuisance, by way of injunction. The purpose of the bill was not to secure punishment of the offenders, but to prevent the continuance of the act complained of, which the evidence showed, was not prevented by the criminal prosecutions provided for by our statutes. This principle is well set forth in Stead v. Fortner, 255 Ill. 469, where this question was involved, and Mr. Justice Cartwright, speaking on behalf of the court, said, p. 475:

> "The jurisdiction of courts of equity to enjoin nuisances is ancient and extends at least back to the reign of Queen Elizabeth, and in cases of public nuisances an indictment not only lies to abate them and punish the offenders, but an information also lies in equity to redress the grievance by way of injunction, on the ground that courts of equity have ability to give a more complete and perfect remedy, operating through future time, than is attainable by law." (citing authorities)

In that case the court fully sustained the power of a court of equity to restrain acts otherwise punishable, upon the theory that they constituted a common nuisance. But the identical question was passed upon by our Supreme court in People v. Nellie , 248 Ill. 136, which was also a prosecution for contempt of court for the violation of an injunction similar to that issued in the case at bar. A reading of that case makes it apparent at a glance, that the procedure there adopted was followed in the case at bar, and the court in that case said, p.161:

> "Plaintiff in error contends a court of equity has no jurisdiction to punish crime, and that is true if punishment of crime is the only object of the proceeding; but the rule is, that where a nuisance affects the public welfare it may be abated in equity on the application of the proper officer, and that a house of ill-fame may be or become a nuisance of that character. This is partisularly true where the ordinary method of prosecution for the criminal offense proves ineffective. (citing authorities). At the common law two classes of disorderly houses were nuisances per se, being dram-shops and bawdy houses, the latter because they attract and draw together lewd and debauched persons and tend to disturb the public peace and to increase immorality among the people." (citing authorities)

And on page 163 the court said further:

> "We are of the opinion the proceedings were regular and sufficient, the court had jurisdiction, the place complained of is a public nuisance subject to be abated in chancery, and the punishment inflicted for violation of the injunction was a proper exercise of the power of the court in that regard."

In that case defendant was found guilty of contempt of court and a fine of $200 was imposed, and defendant was also sentenced to serve 45 days in jail.

It is further urged that the denials under oath by the defendants of the acts with which they were charged, entitled them to an immediate discharge; and that proof beyond a reasonable doubt was requisite to a conviction. Underlying these contentions is the theory that the proceeding below was to punish a criminal contempt and was in the nature of a criminal prosecution.

Proceedings for contempt of court are of two classes: those which are criminal in their nature, which are sometimes called common-law contempts, and those which are intended as purely civil remedies, which ordinarily arise out of the alleged violation of some order entered in the course of a chancery proceeding and are known as civil contempts. (People v. Seymour, 191 Ill. App. 301). In Hake v. The People, 230 Ill. 174, the court said, p.185:

> "In cases of common-law jurisdiction for contempt the defendant is tried upon his answer made to interrogatories filed. No other evidence is heard. If the answers prove false the remedy is by indictment for perjury, but if the party purges himself of the contempt by his answer he will be discharged. In a proceeding for contempt for violation of orders in chancery the court will hear affidavits pro and con, and may also avail itself of any other legal evidence that will aid the court to determine the question according to right and justice."

The proceeding here before us is, under the foregoing authorities a civil prosecution, and as the contention of the defendants is based upon a misconception of the nature of the proceedings, their position is untenable.

Defendants contend that the finding of the court is manifestly contrary to the weight of the evidence. We have already stated in general terms the character of the evidence introduced in the case at bar. It would serve no useful purpose to set forth in detail the testimony on behalf of either or both sides, as we are satisfied, from a careful examination of the record, that the evidence supports the finding of the court.

Defendants finally complain that the punishment inflicted by the court is excessive. It is a sufficient answer to this contention, to say that the fixing of punishment is within the sound discretion of the court, and unless there is a manifest abuse of this discretion and the law of the land or principles of equity have been violated in the exercise thereof, the action of the court is not subject to review. In our opinion, the record in this does not show an abuse of the court's discretion.

Finding no reversible error, the judgment of the City Court of Chicago Heights will be affirmed.

AFFIRMED.

247 - 21228.

ANTON J. CERMAK, Bailiff of the Municipal Court of Chicago, for use City Hall Square Company, a corporation,

Defendants in Error,

vs.

ROYAL FURNITURE COMPANY, a corporation, and Chicago Bonding & Surety Company, a corporation,

Plaintiffs in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

199 I.A. 413

STATEMENT OF THE CASE.- This is an action in debt, wherein ~~defendant in error (plaintiff below)~~, recovered a judgment for $861.40 and costs against ~~plaintiffs in error (defendants below)~~, on a replevin bond, and is the aftermath of a replevin suit brought in the Municipal Court of Chicago by the Royal Furniture Company against the City Hall Square Company, for the possession of certain furniture, to which the Royal Furniture Company claimed title by virtue of two chattel mortgages executed on July 10 and August 10, 1915, respectively, by I. C. Newman & Company, a corporation, in favor of the said Royal Furniture Company. The chattel mortgages under which the Royal Furniture Company claimed title were executed by the said I. C. Newman & Company, acting through its treasurer, and were acknowledged on the aforesaid dates by one Carl W. Nelson as attorney in fact, who derived his authority under a power of attorney attached to each of these documents. The validity of these two chattel mortgages as against third persons is, under a stipulation between the parties, the sole question to be determined.

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

In W. W. Kimball Co. v. Polakow, 190 Ill. App. 174; id. 268 Ill. 344, it is held that sec. 2 of our Chattel Mortgage Act, R. S., ch. 95 contains no provision authorizing an acknowledgement of a chattel mortgage by an attorney in fact acting under a power of attorney; that a chattel mortgage is a form of lien unknown to the common law; that as the statute creating chattel mortgages is in derogation of the common law, it must be strictly construed. The chattel mortgage there under consideration, which was acknowledged by an attorney in fact acting under a power of attorney, was held invalid as against those not parties or privies thereto. To the same effect is Baldwin Co. v. Keeley, Ill. App. Gen. No. 21139.

It is contended, however, by counsel for defendants, that the principle just announced does not apply to corporations; that a corporation can act only through its agents, and that from the record in this case it must be considered that the acknowledgment by the said Nelson was an acknowledgment by I. C. Newman & Co. through its authorized officer. While a corporation has the right to execute and acknowledge chattel mortgages by its authorized officers, yet the acknowledgment by Nelson cannot be regarded as the act of I. C. Newman & Co. through a duly authorized officer. An examination of the chattel mortgages shows that they were executed for the corporation by its treasurer, and and that the source of power and authority under which Nelson acted as attorney in fact was a power of attorney attached to each of the documents. In Kimball Co. v.

Polakow, supra, it is expressly held that a chattel mortgage acknowledged by an attorney in fact under a power of attorney is invalid as against third persons, because the statute does not contain any provision authorizing acknowledgments to be made under a power of attorney . This was a holding against acknowledgments by powers of attorney, and must be held to apply to corporations as well as individuals. The mere fact that I. C. Newman & Company is a corporation does not exempt it from a compliance with the provisions of the statute. Hunt Vs. Bullock, 23 Ill. 268. We are of the opinion that the mortgages in question were not acknowledged as provided for under our statute and are therefore invalid as against the City Hall Square Company, and that the court properly found the issues for the plaintiff.

In arriving at this conclusion, we are not unmindful of the fact that since the decision in Kimball Co. v. Polakow, supra, was handed down our Legislature amended section 2 of our Chattel Mortgage Act, supra, whereby an acknowledgment by an attorney in fact acting under a power of attorney is authorized. Session Laws of 1913, p. 528.

Finding no reversible error, the judgment will be affirmed.

AFFIRMED.

286 - 21269.

THE HARMONY COMPANY,
a Corporation,
Appellee,

vs.

THE SANITARY DRINKING CUP
COMPANY, a Corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT,
OF CHICAGO.

199 I.A. 414

STATEMENT OF THE CASE.- ~~Appellee (plaintiff below)~~ brought suit against ~~appellant (defendant below)~~ for damages for the alleged breach of a certain contract entered into between the parties, claiming as its measure of damages the contract price of certain vending machines alleged to have been manufactured by plaintiff at the special instance and request of the defendant under the contract. The court found the issues for the plaintiff, and having entered judgment thereon for $3,000.00 and costs, defendant appeals.

The contract out of which this litigation grew, bore date of February 7, 1912, and was executed in the name of the defendant, by one T. E. Stone, who designated himself therein as general manager. A copy of said contract was attached to and made a part of the statement of claim. Said agreement provided inter alia, that plaintiff was to build for the defendant 1,000 drinking cup vending machines of different types and at varying prices; that the defendant was to take at least one hundred machines a month, and in quantities of not less than fifty at one time; payment to be made promptly after receipt of the machines by defendant; that if all the machines were completed and defendant did not have a place to store them, the defendant would accept and pay for them, the plaintiff, however, to store them free of charge until taken out.

The amended statement of claim alleged that the contract was fully completed and that all the machines therein provided for had been manufactured, save a certain number which were nearly ready for delivery, awaiting defendant's instructions with reference to how they were to be finished, which instructions plaintiff had repeatedly requested from defendant but which the latter failed to furnish; that under the terms of the contract, all of the machines ordered should have been taken away by the defendant and paid for within one year at least from the date of said contract; that all of said machines were ready for delivery, stored at the place of business of the plaintiff, subject to the order of the defendant, of which facts defendant had been repeatedly advised.

The amended affidavit of merits alleged by way of defense, that the said supposed agreement was not executed by defendant, nor by any person authorized by defendant so to do; that said machines were not manufactured at the request or with theknowledge of defendant; that defendant had not been notified of such manufacture or storing of said machines; that defendant bought and paid for machines from time to time from the plaintiff for which it paid the plaintiff in full; that plaintiff had in its possession cash amounting to $169.25 belonging to defendant for machines paid for by the defendant which plaintiff refused to deliver; that defendant was not indebted to the plaintiff in any sum whatever, but that plaintiff owed defendant $169.25 above mentioned.

[MR. PRESIDING JUSTICE FAM delivered the opinion of the court.]

In urging a reversal, defendant contends, first, that the court improperly admitted the contract in evidence,

upon the ground that there was no proof to show that it was executed by anyone in authority on behalf of the defendant company. In arguing this contention defendant claims that the contract itself does not bear any evidence of having been executed by authority of the defendant; that it was not signed by its president or secretary; and that it does not bear the corporate seal of the defendant. While the fact that this contract was not signed by an official ordinarily empowered to enter into contracts and it did not bear the corporate seal of the defendant company may be a circumstance in determining whether or not it was binding on the defendant, yet it is not controlling.

The evidence introduced on behalf of the plaintiff shows that the contract in question which was in the form of a letter addressed to the plaintiff, was signed, "The Sanitary Drinking Cup Company, by N. M. Stone, general manager;" that the defendant company held the said Stone out as its general manager, authorized to act for it in the making of this contract, and that the contract was submitted to the defendant's officers and met with their approval. Moreover, the evidence shows that the machines provided for in this contract were manufactured, and that part of them were delivered and paid for by the defendant. On this question defendant offered no evidence, but contented itself with a cross examination of the witnesses who testified on behalf of the plaintiff and the statements in its affidavit of merits, "that it (defendant) bought and paid for machines from time to time from the plaintiff, for which it paid the plaintiff in full," independently of any contract.

The next question that arises is, whether or not defendant breached the contract. Upon ~~this point we again~~ the question of the breach of the contract there is

here only the evidence offered on behalf of the plaintiff, which fairly tends to show that the machines contracted for by the defendant were manufactured and completed ready for delivery within the period provided for in the contract, save a certain number which were only awaiting defendant's instructions with reference to how they were to be finished. The evidence further showed that defendant failed to accept the machines because it was without funds with which to pay for them. Nowhere was plaintiff's evidence on this question put in issue. Evidently the defendant proceeded upon the theory that there being no contract between the parties, there could be no breach. We are, however, of the opinion that the court was fully warranted in arriving at the conclusion that defendant had breached the contract.

The remaining question is whether the court adopted the proper basis as the measure of plaintiff's damages. As in the case of Ames v. Weir, 130 Ill. 532, the question arises as to "What are the rights of a vendor of goods where the vendee refuses to pay upon delivery or an offer to deliver goods," and it was there held that the vendor had three remedies: First, to store the goods for the vendee, give notice that he has done so, and recover the contract price; second, to keep the goods and recover the difference between the contract and the market price of the goods; and third, to sell the goods to the best advantage and recover the loss if the goods fail to bring the contract price. This rule was adhered to in Cogswell v. Skinner, 211 Ill. 320.

Upon the trial below the question arose as to which of these three remedies the plaintiff endeavored to avail itself of. Plaintiff contends that it had elected to treat the machines as the property of the defendant and that it

held them subject to defendant's order. Defendant contends that the evidence shows plaintiff had elected to keep the property and endeavored to recover the difference between the contract price and the market price of the goods at the time and place of delivery or offer of delivery but had failed to introduce the necessary proof to recover on that theory, hence the judgment of the court is erroneous. Upon this issue the defendant introduced evidence only with reference to the market value of the said machines at the time and place of delivery or offer of delivery. Defendant, however, introduced no evidence to offset the testimony given on behalf of the plaintiff that these goods were ready for delivery and after having been tendered to the defendant, were stored with the plaintiff as provided for in the contract, awaiting the order of the defendant. Furthermore, the evidence showed that at the trial below and also in this court, plaintiff tendered the machines upon payment of the purchase price, as provided for in the contract. As we read the record in this case, the court in finding for the plaintiff and entering judgment for $3,000.00, was evidently of the belief that the preponderance of the evidence showed that plaintiff had treated the machines as the property of the defendant, and was entitled to recover upon the contract for the whole contract price, and we are of the opinion that the court was warranted in arriving at that conclusion. In this view we are upheld by Osgood v. Skinner, supra. The fact that the judgment is for $3,000.00, whereas under the contract the machines in question were worth $3,301.61 is explained by the fact that some of the machines being uncompleted, due allowance therefor was made by the court in entering judgment.

In arriving at our conclusion, we are not unmindful of the fact that defendant argues that the court permitted

a new issue to be injected into this case upon final hearing. We, however, believe this contention is without merit.

Finding no reversible error, the judgment of the Municipal Court of Chicago will be affirmed.

AFFIRMED.

317 - 21301

MALACHI QUINN, Appellee, vs. CITY OF CHICAGO, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

1991 I.A. 416

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

This is an action on the case brought by appellee (plaintiff below), against the appellant (defendant below), to recover damages for an injury sustained by falling on a defective sidewalk in front of 450 west 43rd street, in the City of Chicago. On the trial below, the jury returned a verdict of guilty, assessing plaintiff's damages in the sum of $2,500.00, and from the judgment entered thereon defendant has prosecuted this appeal.

The evidence on behalf of the plaintiff shows that on March 11, 1912 plaintiff, then a man of 61 years of age, ~~who lived at 442 west 44th place~~, went ~~to a grocery store owned by one Mrs. Hayes~~ on 43rd street, ~~on an errand for his wife~~; that during the night before and on that morning there had been a heavy snowfall which covered the sidewalks and streets; that plaintiff ~~left the grocery store in question and~~ was walking east on 43rd street on the north side of the street; ~~that he came~~ in front of 450 west

43rd street, where when he suddenly stepped into a depression in the sidewalk and was thrown to the ground, sustaining the injuries for which this suit was brought; that the depression in the sidewalk into which plaintiff fell, was due to an entire panel or block of cement having been in some way removed from said sidewalk several months previously; that on the morning in question, by reason of the snowfall, the entire sidewalk was covered evenly with snow, so that any depression therein would be unnoticeable; that plaintiff was unacquainted with the neighborhood and knew nothing about the condition of this sidewalk; that at the time of the accident he was walking along slowly and carefully and was in the exercise of ordinary care for his own safety.

Besides the plaintiff there were five witnesses, all of whom testified that at the time of the accident there was a panel of cement missing from the sidewalk and that said walk had been in such condition for several months prior to the accident. Two of these were eyewitnesses to the accident, and corroborated the testimony of the plaintiff as to the manner in which it occurred.

The sole defense relied upon at the trial was that at the time and place of the accident no cement block was missing from the sidewalk at the place of the accident ~~in front of 450 west 43rd street~~. It was not denied that a cement block had been missing but it was claimed that such block had been replaced before the accident and that the sidewalk thereafter up to and including the time of the accident, continued to be in good condition. Defendant introduced the testimony of five witnesses which tended

to show that during November, 1911, about four months prior to the accident, the cement panel that had been removed was replaced and they argue seriously to this court that the testimony of these five witnesses and the inferences that reasonably flow therefrom clearly establish the fact that at the time of the accident there was no depression in the sidewalk caused by the absence of a cement panel. It would serve no useful purpose to set forth in detail the testimony on this issue in the case. An examination of the record shows that there was a strong and sharp conflict in the evidence. It was clearly a question of fact for the determination of the jury under proper instructions by the court as to the law applicable to the facts and circumstances in evidence. The jury saw the witnesses and heard them testify, as did also the court, and were in a better position to judge of their credibility and the weight to be attached to their testimony. The jury by their verdict evidently believed the testimony offered on behalf of the plaintiff, and the court in entering judgment thereon and in overruling defendant's motion for a new trial was evidently of the belief that the jury were warranted in arriving at their conclusion. After a careful examination of the record we cannot say that the verdict is clearly and manifestly against the weight of the evidence. The judgment of the Circuit Court of Cook County must therefore be affirmed.

AFFIRMED.

[illegible] - [illegible].

J. R. THOMPSON COMPANY,
Plaintiff- Appellant,

vs.

MARY FRANCIS BURNS and
WILLIAM FOSTER BURNS,
Defendants-Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

199 I.A. 418

MR. JUSTICE GRIDLEY delivered the opinion of the court.

Appellant, hereinafter referred to as plaintiff, seeks to set aside an order entered in the court below, dismissing the cause for want of prosecution, and also to set aside an order vacating a judgment in its favor against appellees, hereinafter referred to as defendants.

Ⓐ Plaintiff brought this suit against defendants for a balance due on a note, which was [illegible] ~~set out in~~ the declaration, as follows:

> "$1589.79 Chicago, Dec. 19, 1916.
>
> On or before (seventy days) after date we promise to pay to the order of J. R. Thompson Company Fifteen hundred eighty nine & 79/100 dollars at the office of J. R. Thompson Company, Chicago. Value received with interest at 6% payable semi-annually.
>
> Mary Francis Burns,
> W. Foster Burns.
>
> The within note is given in full settlement payment and satisfaction of any and all claims J. R. Thompson Company or Charles J. Thompson have or may have against Mary Francis Burns or W. Foster Burns."

Defendants pleaded that the promises in the declaration referred to were made to the plaintiff and one Charles J. Thompson, who was then living, and not to the plaintiff alone. B By this plea it is claimed the defendants properly raised the question of whether, when properly construed, the instrument sued on gave rise to a cause of action in favor of the plaintiff and one Charles J. Thompson jointly, or in favor of the plaintiff alone. (Chitty on Pleading, 16th American Ed. p. 11.) The only issue of fact tendered by the plea was as to

whether the other person alleged to be a necessary party plaintiff was living. Necessarily, if the obligation ran to both plaintiff and another, the action could not be maintained by the plaintiff alone. In this plea, however, the plaintiff filed a replication stating that the obligation ran to the plaintiff alone. In the instrument read on was set out in the pleadings, the question of whether the obligation ran to the plaintiff or to the plaintiff and another was a question of construction and not in issuable condition of fact. In this state of the pleadings, plaintiff's counsel moved for judgment December 8th in lieu of the case called on the trial call. December 10th, the case was called in the absence of the defendants, a jury impanelled, a verdict returned for [illegible], and judgment entered thereon. December 14th, 1917, a motion was entered to vacate the judgment, which was heard December 17th, on the affidavit of one of the defendants and the counter-affidavit of two of plaintiff's counsel. The affidavit on behalf of defendants was to the effect that affiant presumed that the court had set down the special plea for hearing and argument for December 8, 1917, that he had heard nothing of the call of the case for trial until the afternoon of Monday, December 10, 1917, after judgment had been entered, and that if their plea was not sustained they had a plea to the merits to the claim of the plaintiff's demand, to that effect was, at the commencement of the suit, tendered to the defendants to sign and verify. The counter affidavits stated that the case had been set down for trial for Monday, December 10, in the presence of the defendants; that it was not true that the claim was not from the amount or a special [illegible]

plea. Upon the showing made, the court set aside the judgment.

In cases of this character the judgment of the trial court will not be reversed on account of its action in setting aside or in refusing to set aside a judgment entered within the term, unless it appears that the court has abused its discretion. The general rule is that where a motion to set aside a verdict is made, diligence and merit must be shown. Diligence was clearly shown here, since the motion to set aside the judgment was entered within two days from the entry of judgment, and at the earliest possible moment such a motion could properly have been presented in accordance with the usual rule of the court in regard to motions. As the plea and replication presented no issue triable by a jury, and, indeed, no issue of fact, the defendants were, of course, justified in their belief that the court had set the plea down for argument. In view of this state of the record and of the fact that defendants presented an affidavit showing that they had misunderstood the date for which the hearing was set, and that they had a meritorious defense to the suit on the merits, we could, in any event, be unable to say that the court abused the discretion with which the law invests it. Upon this point, our Supreme Court has said, in Sulzer v. Drickhoff, 108 Ill. 147, speaking through Mr. Justice Magruder:

> "It is well settled in this State, that a motion to set aside a default is addressed to the sound legal discretion of the court, and unless it appears that such discretion has been wrongfully and oppressively exercised, this court on appeal will not interfere."

The case here is stronger because the defendants were not in default, but had filed a plea.

The action of the court in setting aside the

judgment was clearly proper for the further reason that at the time it was entered, there was [pending] a plea in abatement] The existence of this unadjudicated plea rendered the [judgment at least irregular] if not invalid, and fully justified the court in setting the judgment aside.

Plaintiff further contends that the court erred in permitting the defendants to [withdraw their plea in abatement and plead to the merits after issues had been made up and the cause reached for trial.] This contention is clearly without merit. Section 55 of the Practice Act fully empowered the court to take the action complained of. The question of whether the court would or would not permit the plaintiff to plead to the merits was a matter within its sound discretion, and there is nothing in this record which shows that that discretion had been abused.

It may be noted also that at the time the judgment in favor of the plaintiff was set aside, its counsel, had they chosen to do so, [could have asked for the disposition of the plea in abatement and for a hearing on the merits immediately, and in addition, could have asked the court to impose terms in its order setting aside the judgment.] They chose, however, to do neither, but to rely upon a supposed error in setting the judgment aside. When the cause was finally called for trial, after the plea in abatement had been withdrawn and pleas to the merits filed, plaintiff refused to proceed, and again asked to have the order vacating the judgment set aside. When this motion was denied, it again refused to proceed and the court dismissed the suit for want of prosecution. For the reasons stated above, we are of the opinion that the court did not err in so doing.

AFFIRMED.

rehg

471 - 20762.

CHARLES H. THOMPSON COMPANY,
A Corporation,
Plaintiff-Appellant,

vs.

MARY FRANCIS BURNS and
WILLIAM FOSTER BURNS,
Defendants-Appellees.

APPEAL FROM
COUNTY COURT,
COOK COUNTY.

1930 I.A. 418

ADDITIONAL OPINION FILED ON PETITION FOR REHEARING.

MR. JUSTICE HODDIN delivered the opinion of the court.

Counsel for plaintiff has filed with his petition for rehearing a certified copy of the declaration which shows that the instrument sued upon was not set out in the declaration, but attached to it, and in view of this state of the record, contends that the plea in abatement raised an issue of fact, since the instrument sued upon, although attached to the declaration, was no part of it. While the opinion of Mr. Chief Justice Waite in Nauvoo v. Ritter, 97 U. S. 389, where, in speaking for the United States Supreme Court, he held that instruments attached to a declaration in obedience to the Illinois Practice Act become a part of the pleadings in the case, seems logically sound, still, the law, as settled by the decisions of the Illinois Supreme Court, sustain counsel's contention that, technically at least, the instrument sued upon is no part of the declaration. It therefore follows from the state of the record disclosed by the copy of the declaration filed with the present petition that the question raised by the plea in abatement as to whether the suit was defective for want of a necessary party, could not be determined until the note, a copy of which was attached to the declaration, was formally offered in evidence. Notwithstanding this fact,

it clearly appears from the affidavit of the defendant William Burns, as well as the affidavit of plaintiff's counsel who appears here, that when the case was set for a hearing, said defendant insisted that his plea in abatement was well founded, but said that if there was any doubt about it, he would want permission to make defense upon the merits, and that "thereupon the court announced that Burns could present his motion at the time of the trial." It therefore appears from counsel's own affidavit that had defendants been present when the case was called, they would not have gone to trial on the plea in abatement, since they had already stated their intention to ask leave to plead to the merits if there was any doubt about the validity of his plea in abatement. Plaintiff, however, apparently contends that it had an unqualified right to go to trial upon the issue made up on the plea in abatement, and that the court had no right to change that issue by giving leave to withdraw the plea in abatement and plead to the merits, and that upon that issue there could have been but one result, since the terms of the note made it payable to the plaintiff, and not to the plaintiff and Charles H. Thompson. While it is true that [if judgment is rendered upon such a plea, the judgment is properly quod recuperet, nevertheless, it is within the discretion of the court to permit the withdrawal of the plea in abatement, and plead to the merits at any time before judgment, even after there has been a finding in favor of the plaintiff on the issue raised by the plea in abatement;] in fact, Tolleck v. Kinman, 176 Ill. App. 381, seems to go to the extent of holding that it is an abuse of the trial court's discretion to refuse to

allow a defendant to do so.

It was, therefore, within the discretion of the court to permit the defendants to withdraw their plea in abatement and plead to the merits in accordance with the motion which they had previously stated in open court that they intended to make. But counsel insists that in connection with defendants' motion to set aside the judgment they showed neither diligence or merit. As already indicated in our original opinion, the matters presented by the affidavit offered by defendants amply justified the court in believing that the absence of the defendants on December 16, was due to an honest mistake in regard to the date for which the cause was set for hearing, and to no negligence or want of diligence. We are also of the opinion that the court was warranted in acting upon the affidavit of one of the defendants who stated "that said defendants have a good and meritorious defense to whole of said plaintiff's demands and that said plaintiff was indebted before and at the commencement of this suit and still is indebted to said defendants in the sum of Five Hundred Dollars, and that if required by said court to interpose a defense other than that now pending in said court, he verily believes a verdict will be given in favor of said defendants." While this statement is, strictly speaking,

a conclusion of law, it does apprise the court of the nature of the defense intended to be made, and does not come within Culver v. Reinkerhoff, 180 Ill. [illegible], and Roberts v. Gerby, 86 Ill. 1[illegible], cited by counsel for plaintiff, which go no further than to uphold the action of the trial court in refusing to set aside a default or grant a new trial where the affidavit simply alleged that the defendants had a good and valid defense, without stating in what it consisted, or any facts from which the court could see that they had any substantial defense to the claim. It does not appear that the plaintiff made any showing that its rights would in any way be prejudiced by the action of the court in setting the judgment aside, and it did not ask that the action of the court be made on terms, either in regard to the payment of costs or the summary disposition of the case, but rather chose to rely upon a supposed abuse of the court's discretion.

Upon a careful consideration of the petition and the record as abstracted by counsel for petitioner, we are unable to see wherein the court abused the discretion with which it was invested, and must, therefore, deny the rehearing.

REHEARING DENIED.

21067

94 - 21067.

EMMA T. HULSEMA, Defendant in Error,	ERROR TO
vs.	MUNICIPAL COURT
CHARLES RIGTER, Impleaded with J. H. Wells, Plaintiff in Error.	OF CHICAGO.

1991.A.435

MR. JUSTICE CARTER delivered the opinion of the court.

~~This writ of error is sued out to reverse a judgment for [illegible] against plaintiff in error.~~

(1) Plaintiff ~~below~~ brought suit August 22, 1914, for attorney's fees, rent for the months of July and August, and for possession of certain real estate. It appears that upon the institution of the suit, and before the September rent accrued, the premises were vacated by the defendants; that there had been deposited with the plaintiff the sum of [illegible] to secure the payment of the last month's rent named in the lease. The court allowed a judgment for the August rent, eleven days of the September rent, and $20 attorney's fees. (2) ~~The plaintiff appears from the evidence that~~ defendants left the premises upon the institution of this suit for forcible detainer, before the September rent accrued; for that reason it was erroneous to allow a recovery for any part of the September rent. In no case, however, could rent be recovered in this action for any part of that rent, since the suit was instituted before the September installment of rent became due. (Conlin, Vale & Co. v. Cuse, 73 Ill. 407; see citations at page 408.) It further appears that there is no stipulation in the lease for attorney's fees, except where judgment is confessed; the allowance of attorney's fees was, therefore, improper.

Plaintiff in error further claims that it was improper to allow the lease in evidence, because of his testimony that he signed it in blank, and for the further reason that it was not referred to in plaintiff's statement of claim. This contention is without merit. It is sufficient to say that there was ample evidence to justify the court in concluding that the lease was fully made out when it was signed. In answer to the second ground for excluding the lease, it may be said that plaintiff's statement fully apprised defendants of the nature of his claim, and under that statement of claim, the lease in question was competent evidence. While the sum for which plaintiff was entitled to judgment is shown definitely by the evidence to be $[illegible].00, yet, in view of the fact that plaintiff in error's co-defendant has not appealed, it will be necessary to remand the case for further proceedings in the court below in conformity with this opinion.

[illegible].

190 - 21094.

EMMA BUNDLE,
Defendant in error,

vs.

MORRIS GUNT,
Plaintiff in error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

199 I.A. 437

MR. JUSTICE GOODWIN delivered the opinion of the court.

Plaintiff in error seeks to reverse a judgment against him for $100.00 for damages alleged to have been suffered by the defendant in error. (1) The evidence disclosed that while plaintiff was passing by the place of business of defendant, she was bitten by a dog belonging to the latter. It is admitted that the defendant had no knowledge of any vicious or mischievous propensities of the dog previous to the attack in question; that there was a valid city ordinance in force providing that "No person shall cause or permit any dog owned or kept by him to run at large on any street, alley, or other public place within the city, at any time, unless such dog shall be securely muzzled so as to effectually prevent it from biting any person or animal;" and that the ordinance also provided a penalty. (2)

Defendant's counsel contends that there can be no recovery in a suit of this kind without proof of scienter. The law is that where an owner has knowledge of the mischievous propensities of an animal of a kind not naturally vicious, he is liable for any personal injuries caused by the animal, acting in accord with that known propensity. The liability thus imposed upon the owner is not based upon negligence, but rather upon the fact that he continued to be the owner of an animal which he knew to be dangerous. (Ahlstrand v. Ziegler, 87 Ill. App. 404; Hammond v. Belton, 42 Ill. App. 188; Stumpe v. Kelley, 87 Ill. 343.) But the action in the case at bar is brought upon no such theory.

law forbade the defendant to permit his dog to go unmuzzled on the highway; he failed to comply with the terms of the ordinance, and his illegal omission resulted directly in the injuries complained of. That damages resulting from a failure to comply with the terms of a municipal ordinance give rise to an action, is well settled. In Wright v. C. & E. I. R. R. Co., 7 Ill App. 439, suit was brought for injury to property resulting from a failure to comply with the terms of an ordinance of the city of Chicago in regard to the storage of inflammable oils. In setting aside a judgment for the defendant based upon a directed verdict, Mr. Justice Gallistor said, p. 447:

> "Although it is not averred in so many words that the defendant wrongfully, and contrary to said ordinance had and kept the prohibited articles on storage upon its premises, yet it is averred that the defendant, not regarding its duty in that behalf, nor the said ordinance, did, on, etc., have, and store in its said building large quantities, etc., then specifying the prohibited articles and quantities, so as to bring the act within the prohibition of such ordinance. These averments, we must hold as sufficient to show that the act of having such articles in store upon the defendant's premises at the time in question was unlawful. The act being unlawful, the count then showing with reasonable certainty that plaintiffs sustained actual damage as a proximate result of such unlawful act, cannot be regarded otherwise than as stating a cause of action within the rules of law, above laid down."

We are, therefore, of the opinion that the trial court did not err in finding the issues for the plaintiff and entering a judgment in its favor.

AFFIRMED.

- 21113.

W. GRACZYKOWSKI, trading as Division Street Iron Works,

Defendant in Error,

vs.

WANDA WYSOCKI,

Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

199 I.A. 442

MR. JUSTICE GOODWIN delivered the opinion of the court.

Plaintiff in error seeks to reverse a judgment rendered against her in the Municipal Court for $80.00 for iron work furnished for a building belonging to her. The ~~defendant in error, who was the~~ plaintiff ~~below~~, testified that the work and labor were furnished under a contract with the defendant, by which she agreed to pay him $85.00 for the work and materials. He was corroborated by a witness who testified that he was present when the agreement was made. This testimony was directly contradicted by the defendant. Defendant claims that plaintiff did not establish his case by a preponderance of the evidence, and that defendant's testimony was supported by the fact that she had made a general contract including the iron work in question prior to the alleged agreement upon which the suit is brought. Plaintiff's case did not rest upon his statement alone, but was corroboratedp ~~in this state of the record we are unable to say that the finding of the trial court was erroneous.~~ Defendant ~~also~~ offered evidence to show that the work and labor were worth much less than the alleged contract price, and points out that the plaintiff's own testimony tended to show that the material and labor were worth only $68.00.

B

As plaintiff's claim was predicated upon a special contract, the amount of the judgment could not be affected by evidence in regard to what the labor and materials were reasonably worth.

The judgment must be affirmed.

AFFIRMED.

1/?1

199 - Filed

[illegible] S. [illegible],
Plaintiff in Error,

vs.

[illegible] & COMPANY,
a Corporation,
Defendant in Error.

ERROR TO (1683)

MUNICIPAL COURT

OF CHICAGO.

199 I.A. 443

MR. JUSTICE GOODWIN delivered the opinion of the court.

The plaintiff in error, who was the plaintiff below, sued out this writ of error to reverse a judgment in favor of the defendant. Plaintiff's claim was for the loss of an express shipment made February 9, 1911, consigned to his own order at Harris, Missouri. The statement of claim set forth the shipment and a wrongful and unauthorized delivery of the goods to some one not entitled to receive them. Defendant denied that the delivery was unauthorized, and further set out that said shipment was made under a contract in part as follows:

> "In no event shall the company be liable for any loss, damage or delay unless written claim therefor shall be presented to it within 90 days of the date of such loss, damage or delay, and any suit or suits for or on account of such loss, damage or delay shall be brought within one year from the date hereof, or be forfeited, any statute of limitations to the contrary notwithstanding."

Defendant further stated that no claim was made within the ninety days, and no suit was brought within the year.

The court found that the defendant negligently made an unauthorized delivery, but further found that the plaintiff failed to comply with the terms of the bill of lading, and, therefore, could not recover.

Counsel for plaintiff has very briefly stated that an action of trover would lie against a carrier who delivers goods to a wrong person, and that they did not consider that the receipt or bill of lading had anything to do with the merits of the case. We are, however,

unable to see why the provisions of the bill of lading were not material, nor are we able to discover any reason for saying that the conclusion of the trial court that the terms of the bill of lading were not complied with by the plaintiff, is not amply sustained by the evidence. Provisions in shipping contracts that no suit shall be brought after the lapse of a given number of days from the happening of any loss or damage, and requiring suits to be brought within a period less than that fixed by the statute of limitations, have frequently been upheld. (*Missouri, K. & T. Ry. Co. v. Harriman*, 227 U. S. 657; *Michigan Central Railroad Co. v. Vreeland*, *id.* 59; *Adams Express Co. v. Croninger*, 226 U. S. 491.)

In *Southern Express Co. v. Caldwell*, 21 Wall. 264, which was a case very similar to this, in that the plaintiff sued an express company for failure to deliver a certain package, the court, in upholding the validity of a stipulation in regard to notice, said, p. 268:

> "A common carrier is always responsible for his negligence, no matter what his stipulations may be. But an agreement that in case of failure by the carrier to deliver the goods, a claim shall be made by the bailor, or by the consignee, within a specified period, if that period be a reasonable one, is altogether of a different character. It contravenes no public policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence, and of capacity, which the strictest rules of the common law ever required."

[redacted]

Counsel's contention that this action is, in substance, in trover, and that the stipulation in the contract does not apply, is equally without merit. The facts disclose that the goods were lost through an unauthorized delivery, and this comes within the express stipulation of the plaintiff that "in no event shall the company be liable for any loss, damage or delay," unless the claim is made within the time specified, and suit brought within one year. In its affidavit of merits the defendant expressly relied upon this stipulation in the bill of lading, and no attempt was made to show a waiver by the defendant.

As this was an interstate shipment, the decisions of the United States Supreme Court on the subject are the law of the case. As the affidavit of defense set out the failure to bring suit within the year and as the conclusions of the trial court that the provisions of the contract were not complied with by the plaintiff is not contrary to the manifest weight of the evidence, the judgment must be affirmed.

Affirmed.

421 - 21819.

THE PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

vs.

FRANK WOLF,

Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

199 I.A. 445

MR. JUSTICE GOODWIN delivered the opinion of the court.

This writ of error is sued out to reverse a judgment of the Municipal Court adjudging the defendant guilty of the criminal offense of being a vagabond, sentencing him to three months in the House of Correction, and further adjudging that the People recover the costs. The information charged that the defendant, "heretofore, to-wit, on the 3rd day of May, A. D. 1914, at the City of Chicago, aforesaid, is known to be a thief, burglar or pickpocket, having no lawful means of support, and was habitually found prowling around steamboat landings, railroad depots, banking institutions, places of amusement, auction rooms, stores, shops or crowded thoroughfares, cars or omnibuses, or at any public gatherings or assemblies, or lounging about court-rooms, private dwelling houses or outhouses, or found in houses of ill-fame, gambling houses or tippling shops," etc.

The first objection is that the information is insufficient because it is not alleged that the defendant was known to be a thief, burglar or pick-

pocket in any manner prescribed by the statute. It is a sufficient answer to this contention to say that the statute says "either by their own confession or otherwise, or by having been convicted," etc. The material fact to be charged is that the defendant is known to be a thief, and it obviously is unnecessary to state in the information whether that knowledge comes by his own confession "or otherwise," as the means by which the fact is known is a mere matter of evidence, and is not a substantive part of the crime charged.

It is next contended that it was not alleged at what time the defendant prowled or lounged around the various places mentioned. This contention cannot be supported, in view of the fact that the information definitely charges that the defendant, "heretofore, to-wit, on the 3rd day of May, A. D. 1914, at the City of Chicago, aforesaid, * * * was habitually found prowling around steamboat landings," etc. The contention that the lounging and prowling was before he was known to be a thief, burglar, or pickpocket, is equally unsound, for the allegation is that the defendant "heretofore, to-wit, on the 3rd day of May," etc., "is known to be a thief," etc., "and was habitually found prowling around steamboat landings," etc. While the statement that "Frank Wolf * * * heretofore, to-wit, on the 3rd day of May * * * is known to be a thief," is ungrammatical, it is, in meaning, exactly equivalent to "was known to be a thief," and indicates no different point of time from that stated in the expression "was habitually found prowling", etc.

Defendant's next contention that the information is vague and uncertain seems equally without merit. The word "thief" is a general word which includes within its meaning burglars, pickpockets and, in fact, everyone guilty of the crime of stealing. Had the information merely charged the defendant with being a known thief, it would have been sufficient, and evidence that he was known to be a pickpocket or burglar would have supported the information: it is, therefore, not defective because it follows the redundant expression contained in the statute, and said, "thief, burglar, or pickpocket." The allegation that he was "habitually found prowling around steamboat landings, railroad depots, banking institutions, places of amusement," etc., is, in one aspect, equivalent to a charge that he was habitually found in all of the places named. In any event, the charge is definitely made that he was habitually found prowling around some, at least, of the places designated by the statute; the information cannot, therefore, be said to be defective in substance, for every element necessary to constitute the offense is charged. Counsel for defendant contend, however, that the language used did not sufficiently apprise the defendant of the places in which he was found prowling. It seems a sufficient answer to this contention to say that if defendant considered the charge vague or indefinite, he had a right to ask for a bill of particulars; as he did not elect to do so, it must be assumed that the information was sufficiently definite to permit him to present his defense. The defect, if it was a defect, was one which did not go to the real merits of the case on the question of the guilt or innocence of the accused, and was, therefore, waived by the failure of the defendant to make a motion to quash.

(People v. Weber, 188 Ill. App. 188; People v. Greenberg, 172 Ill. App. 360; People v. Perez, 181 Ill. App. 868; Glover v. The People, 204 Ill. 170.)

For the reasons indicated, the judgment of the Municipal Court is affirmed.

AFFIRMED.

28 - 20571.

GEORGE G. HARROWS,

Defendant in Error,

vs.

CAROLINE CONNELLY, et al,

Plaintiffs in Error.

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

199 I.A. 448

MR. JUSTICE O'CONNOR delivered the opinion of the court.

The Circuit Court of Cook County entered a decree of foreclosure in a chancery proceeding, to reverse which this writ of error is sued out. A bill was filed to foreclose a trust deed, conveying certain real estate to secure a promissory note. After certain phases of the case had been referred to two different masters, each of whom made a report, the cause was referred to Master Rogers, to take proofs and report the same together with his conclusions. After all the evidence had been introduced, the master made his report finding that all the material allegations of the bill as amended had been proved, and recommended that a decree of foreclosure be entered in accordance with the prayer thereof. No objections or exceptions were filed to this report, and afterwards a decree was entered in accordance with the recommendations of the master. From the decree an appeal was taken to this court. The appeal was dismissed for the reason that it was not prosecuted in conformity with the order allowing the same. We there pointed out that no objections or exceptions had been filed to the Master's report and after holding the appeal was not properly prosecuted, we there said: "We might add, however, that from our inspection and con-

sideration of the record we are of the opinion that in any event the appeal is without merit." (Hopper v. Connelly, 178 Ill. App. 119). The record is again before us on a writ of error.

Numerous errors are argued by plaintiffs in error, the principal contention being that judgment by confession was entered on the note to secure which the trust deed was given in May 1907, while the bill to foreclose was not filed until December, 1907, and that the bill declared on the note instead of on the judgment. On the hearing before the master complainants offered proof which tended to show that subsequent to the time the bill was filed George G. Barrows, the defendant in error, purchased the note and trust deed. Proofs were closed November 10, 1910. December 6, 1910, defendant in error, to make the bill and proofs correspond, obtained leave of court to make such formal amendment and Barrows was substituted as complainant in lieu of Hopper the original complainant and owner of the note and trust deed. The bill was amended accordingly. At the same time plaintiffs in error were given leave to plead or answer to the bill as amended, and on December 14, 1910, filed a plea which set up, among other things, that judgment by confession had been entered on the note in May, 1907, and was subsequently satisfied of record. Plaintiffs in error did not bring the matter of this plea nor any evidence to substantiate its averments to the attention of the master, and on February 4, 1911, the master made his report. We have carefully examined all of the testimony in the record, and it nowhere appears that any point was made before master Rogers that the

note had been reduced to judgment. We find in the record what purports to be a certificate of evidence, which includes not only all the evidence introduced before master Rogers but a great many other documents. This is not proper. Where a cause has been referred to a master to take and report the evidence and his conclusions, it is not competent that other evidence be considered. Cox v. Pierce, 120 Ill. 556; Allison v. Perry, 130 Ill. 9; Schumann v. Hellberg, 62 Ill. App. 219; Gould v. Elgin City Banking Co., 36 Ill. App. 390; Smith v. Billings, 62 Ill. App. 77. Furthermore, a certificate of evidence is unnecessary and has no proper place in the record where all the evidence is taken before the master and included in his report. Martin v. Todd, 211 Ill. 205; Atwood v. Knowlson, 91 Ill. App. 265. The master's report is fully justified by the evidence and no objection or exceptions were filed. The finding of the master where no objections are filed to his report are conclusive. Barney v. Commrs. of Lincoln Park, 203 Ill. 397. Objections to the findings of a master cannot be first raised on appeal. Gehrke v. Gehrke, 190 Ill. 166. They are a prerequisite to review the findings of fact. Marble v. Thomas. 178 Ill. 540. In the case of Jewell v. Rock River Paper Co., 101 Ill. 57, the court say: "It is well settled that where matters of fact are referred to a master for his determination, it is the duty of the parties, when notified, as was done here, to appear before him and there contest the matter, and if his findings are not, in their judgment, supported by the evidence it is their duty to interpose their objections, so as to afford the master an opportunity to modify his report if it should happen to be wrong, and if in such cases after hearing the objections, the master declines to modify or change his

note had been reduced to judgment. [illegible] -- [illegible] -- [illegible] must purporte to be a certificate of evidence, which in- cluded not only all the evidence introduced before [illegible] Dugan [illegible] a great many other documents. This is not proper. Where a [illegible] has been referred to a master to hear and report the evidence and his conclusions, it is not necessary that other evidence be considered. [illegible] v. [illegible], [illegible] 111. [illegible]; [illegible] v. [illegible], [illegible] 111. App. 329; [illegible] v. [illegible] [illegible], [illegible] 111. App. 329; [illegible] v. [illegible], [illegible] 111. App. 77. Nevertheless, a certificate of evidence is unnecessary and has no proper place in the record where all the evidence is taken before the master and included in his report. [illegible] v. [illegible], [illegible] 111. 206; [illegible] v. [illegible], [illegible] 111. App. 327. The master's report is fully justified by the evidence and no objections or exceptions were filed. The finding of the master where no objections are filed to his report are conclusive. [illegible] v. [illegible], [illegible] 111. App. [illegible]. [illegible] to the findings of a master cannot be first raised on appeal. [illegible] v. [illegible], [illegible] 111. App. [illegible]. [illegible] review the findings of fact. [illegible] v. [illegible], [illegible] 111. 327. In the case of [illegible] v. [illegible] [illegible], [illegible] 111. App. [illegible], the court say: "It is well settled that where matters of fact are referred to a master for his determination, it is the duty of the parties, when notified, as we have here, to [illegible] [illegible] [illegible] [illegible], and if the findings are not, in their judgment, supported by the evidence it is their duty to interpose their objections, and if they afford the master an opportunity to modify his report in it should happen to be wrong, and if he does modify after hearing the objections, the master declines to modify or change his

report, it is the duty of the objecting parties, after it has been filed in court, to appear there and file exceptions to it; and where this course has not been pursued, and no sufficient reason is assigned for not doing so, as was the case here, the report of the master, when approved by the court, will be deemed in this court conclusive upon the questions covered by it."

Before making the order of affirmance, we regret that we must say something more. Both the original and reply briefs and arguments for the plaintiffs in error are so full of vituperative, unwarranted and impertinent expressions, as to opposing counsel, masters in chancery and judges of the court before whom the case was heard, that we feel we cannot, having due regard to the respect we entertain for profession and the dignity of the courts, permit the briefs to pass unrebuked, or to remain upon our files, and thus preserve the evidence of the forgetfulness of counsel of their obvious duty. Indeed, we should have noticed the matter at once when it came to our attention had we not feared that by doing so, delay in the examination of the case and possible detriment to the parties would result. The briefs of the plaintiffs in error are therefore ordered to be stricken from the files, and the decree of the Circuit Court of Cook County, in accordance with the views which we have expressed, will be affirmed.

AFFIRMED.

113 - 21097.

METROPOLITAN WEST SIDE ELEVATED RAILWAY COMPANY, Defendant in Error, vs. NICHOLAS GOVOSTIS, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

199 I.A. 451

MR. JUSTICE O'CONNOR delivered the opinion of the court.

The defendant in error (plaintiff) brought this action against the plaintiff in error (defendant) to recover possession of certain premises. The parties will hereafter be designated plaintiff and defendant as in the court below. To reverse a judgment in favor of the plaintiff this writ of error is prosecuted.

Defendant occupied the premises under a written lease dated November 15, 1913, conditioned to expire May 31, 1914, "unless said term is sooner terminated by notice from said party of the first part, as hereinafter provided." Upon the expiration of the lease by its terms, the same was continued in force by a memorandum agreement until December 31, 1914. The lease provided that the same might be terminated by the landlord at any time before the expiration of the term reserved by giving to the tenant five days' notice in writing, and upon the service of such notice the tenant agreed to yield up immediate possession of the premises. On September 29, 1914, the plaintiff served on the defendant the following notice:

"In pursuance of the provisions in a certain lease dated the 15th day of November, 1913, between The Metropolitan West Side Elevated Railway Company and yourself, the terms and provisions of which were continued in force to December 31, 1914, after the termination of said lease on May 31, 1914, by a certain other memorandum of agreement, dated the 1st day of July, 1914, you are hereby notified that the said Railway Company hereby elects to determine said lease at the expiration of (5) days from the date hereof.

"You are further notified to quit and deliver up possession of the premises described in said lease to this company on or before the 4th day of October, 1914."

The defendant having refused to surrender possession as demanded this suit was brought and a judgment in favor of the plaintiff resulted.

The defendant first contends that under the statute a demand for possession of the premises must be made before bringing an action of forcible detainer, where there is no waiver of such demand in the lease, and that, as no waiver was contained in the lease and no such demand was made on him, the judgment is erroneous. This is not the law. Under the statute now in force (Clause 4, Sec. 2, Chap. 57, R.S.) a demand for possession before bringing an action of forcible detainer, against a tenant holding over, is not necessary. Lunden v. Brockway, 157 Ill. 90; Roth v. Hayman, 40 Ill. App. 335; Willerton v. Chesnaker, 60 Ill. App. 120; George A. Cook Co. v. Fitzgerald, 151 Ill. 133. The lease having been terminated in accordance with the provisions thereof, the defendant was holding over, and, under the law, no demand for possession was necessary before bringing suit.

The defendant further contends that the notice above referred to was not sufficient, in that it did not describe the premises with reasonable certainty. No

complaint is made, however, that he was in any way misled. The notice expressly referred to and described the lease between the parties and no one can have any doubt that the defendant clearly understood that the notice referred to the premises which he was occupying under the lease. The notice was sufficient. Parman v. Mohman, 90 Ill. 312.

Finding no reversible error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

136 - 21110

NICK FORTE and PASQUALE FORTE,
doing business as NICK FORTE & BRO.,

Defendants in Error,

vs.

SIMON COHEN,

Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

199 I.A. 462

MR. JUSTICE O'CONNOR delivered the opinion of the court:

Defendants in error (plaintiffs) brought suit against the plaintiff in error (defendant) for service as real estate brokers in procuring a purchaser for defendant's property. A judgment for $155.00 was entered in favor of the plaintiff, and the defendant has removed the cause to this court for review.

We have reached the conclusion that the judgment must be reversed and the cause remanded, but inasmuch as there may be a new trial, we refrain from discussing the evidence in the case.

The contention of the defendant in the court below was that he sold the property through his own efforts, and that the plaintiff did not procure the purchaser for the same. The defendant and his wife both testified in his behalf, and during their examination the court refused to allow them to testify as to what was said and done by them directly with the purchaser of the property. The objection was that, as the conversations took place out of the presence of the plaintiff, they were not admissible. The plaintiffs

sought to prove that they had procured the purchaser for the property, while the defendant sought to prove that he had obtained the purchaser himself. The only way the defendant could present his defense, which was a legitimate one, was to show the negotiations he had with the purchaser. The evidence was relevant to the issues involved in the case and was clearly admissible. Benedict v. Dakin, 243 Ill. 304, affirming 148 Ill. App. 301.

Defendant complains of the court's refusal to give five instructions offered on his behalf. It is a sufficient answer to this contention to say that when the court, after instructing the jury orally, asked if there was any further suggestions, the defendant did not request the court to give the instructions which he now claims should have been given. Furthermore, all of the so-called instructions stated abstract principles of law, and it is not error to refuse such instructions. Chicago City Ry. Co. v. Anderson, 193 Ill. 9; Ill. Watch Co. v. C.B.&.Q. R. Ry. Co. 250 Ill. 396; Aspland v. The Conklin Construction Co., 165 Ill. App. 44

For the error pointed out, the judgment of the Municipal Court will be reversed and the cause remanded.

REVERSED AND REMANDED.

144 - 21130.

NICHOLAS SUDELMAN, doing business as Sudelman & Co.,

Defendant in Error,

vs.

S. B. MATTHESSEN,

Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

199 I.A. 463

MR. JUSTICE O'CONNOR delivered the opinion of the court.

On September 21, 1914, a judgment for $687.50 was entered on the verdict of a jury in favor of defendant in error (plaintiff) and against the plaintiff in error (defendant). The parties will hereinafter be designated plaintiff and defendant as in the court below. On October 5, 1914, defendant made a motion to vacate and set aside said judgment, which motion was overruled and the defendant prosecutes this writ of error.

Plaintiff brought an action in the Municipal Court of Chicago to recover of the defendant commission as a real estate broker for procuring a purchaser for certain real estate. The cause came on for trial before a judge and a jury, and after hearing the evidence, the court instructed the jury to find the issues for the defendant. The jury returned their verdict accordingly and judgment was entered thereon. A writ of error was sued out from this court, and the judgment of the Municipal Court was reversed and the cause remanded (185 Ill. App. 91). On the second trial the defendant did not appear.

Plaintiff introduced evidence and the jury returned a verdict on which the judgment now before us was entered.

On October 5, 1914, the defendant entered a motion to vacate the judgment and filed his affidavit in support thereof, which stated in substance that he did not know of the entry of the judgment against him until a few days after it had been entered; that about June 26, 1914, he was served with notice that the plaintiff would ask that the cause be set for trial at an early date; that afterwards on the same day, he received a telephone message from some one who purported to represent counsel for plaintiff and was informed that he need pay no further attention to the notice, and that he would be again notified before the cause was set for trial; that he paid no further attention to it and received no further notice; that he had a good defense on the merits; that the real estate in question did not belong to him but was the property of the Eagle Sausage Works, a corporation, which was in bankruptcy, and that this was well known to the plaintiff prior to and at the time that he obtained a purchaser for the real estate; that the plaintiff filed his verified petition in the bankruptcy proceeding claiming his commissions as a real estate broker for making the sale; that in said petition plaintiff stated that the defendant was acting as agent of the Eagle Sausage Works; that plaintiff's claim for such commission was disallowed in such bankruptcy proceeding. The affidavit further states that when the defendant entered into the contract for the sale of the real estate, plaintiff knew that the real estate did not belong to the defendant, but that the defendant was acting as agent of the Eagle Sausage Works. Plaintiff filed a counter affidavit in which he admits that he en-

deavored to collect his commissions in the bankruptcy proceeding as above stated; that he then believed under the law that the bankrupt estate was liable for the commissions; that his claim was disallowed in the bankruptcy proceeding; that he afterwards employed counsel who informed him that as the contract was made personally by the defendant and not as agent, the defendant was personally liable. Counsel for plaintiff and their clerks filed affidavits setting up that no one in their office had telephoned that the case would not be set for trial in accordance with the notice served on the defendant; that the case appeared each day on the regular trial call published in the Chicago Daily Law Bulletin from September 11th until September 21st, when it was reached for trial.

Where a party to a suit fails to be present on the trial thereof and a judgment is entered against him, before the court will set aside the same, the defendant must show, first, that he has not been negligent, and second, that he has a meritorious defense. Finkelstein v. Schilling, 135 Ill. App.543; Simons v. Kuncels, 107 Ill. App. 174. The vacation of a judgment is discretionary with the court, and its discretion will be controlled only in case of abuse. Greenleaf v. Moe, 17 Ill. 474; Barrett v. Austin City Cycle Co., 179 Ill. 78. We think the record is sufficient to justify the action of the trial court in refusing to set aside the judgment, on the ground that the defendant did not show that he was free from negligence.

Furthermore, the record tends to show that the defendant entered into the contract for the sale of the real estate personally and not as an agent, and in such case, he would be bound, although he was in fact an agent. Wheeler

v. Reed. 36 Ill. 81; Scelling v. Knollin, 94 Ill. App. 443; Head v. Altgeld, 136 Ill. 298. In the Wheeler case, the court say (p.91): "If a person undertakes to contract as agent for an individual or corporation, and contracts in a manner which is not legally binding on his principal, he is personally responsible; and the agent, when sued upon such contract, can exonerate himself from personal responsibility by showing his authority to bind those for whom he has undertaken to act." To the same effect is the Scelling case, where the court say (p.449): "It is the rule established in this State, that even if the party buying knows that the party selling is a broker, and although there be reason to believe that he is selling for some principal, yet if the party selling does not see fit to bind his principalby the form of the contract made, and does bind himself by the form of the contract, the agent thus contracting in his own name may be held to the liability of a vendor. Wheeler v. Reed, 36 Ill. 81; Burton v. Gudgeed, 68 Ill. 237; Head v. Altgeld, 136 Ill. 298."

Under the rule announced in the foregoing authorities we think that the defendant failed to show a meritorious defense, and the court did not err in refusing to set aside the judgment. The judgment of the Municipal Court is therefore affirmed.

AFFIRMED.

175 - 21152.

ANDERSON COMPUTING SCALE CO.,
Defendant in Error,

vs.

DENA HATTENBACH,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

199 I.A. 467

MR. JUSTICE O'CONNOR delivered the opinion of the court.

The writ of error in this case seeks to reverse a judgment for $75.50 rendered in favor of the defendant in error (plaintiff) and against the plaintiff in error (defendant), in the Municipal Court of Chicago.

The plaintiff, an Indiana corporation, through its agent in Chicago, sold to the defendant, a resident of Chicago, a machine for slicing meats. The machine was delivered to the defendant and $10.00 paid on account of the purchase price.

The defense interposed was (1) that there was a breach of warranty, in that the machine would not properly do the work for which it was intended, and (2) that the plaintiff was a foreign corporation not authorized to do business in this state, and could not therefore maintain this action in the courts of this state.

The evidence tends to show that the agents of the plaintiff solicited the order of the defendant; that the slicing machine was thereafter delivered to the defendant;

that the defendant informed the plaintiff that the machine was not workable; that plaintiff's agents thereupon called at the defendant's place of business for the purpose of remedying the defect; that the machine was not then in the defendant's place of business, and the defendant would not permit the plaintiff's agents to see it; that afterwards the defendant delivered the machine to an express company with instructions to return it to plaintiff; that the plaintiff would not accept the machine when the same was returned.

The defendant contends that there was an implied warranty of the machine, and a breach thereof; on the other hand, the plaintiff contends that there was no such warranty. In the view we take of the case, we shall assume that there was an implied warranty of the machine and a breach of such warranty.

Where there is a sale and delivery of personal property, with an express or an implied warranty, if the property is found to be defective, the purchaser may keep and use the property and sue for damages on a breach of warranty, or when sued for the price, he may recoup such damages. (Underwood v. Wolf, 131 Ill. 425.) In that case, the court say, (P.435):

> "Where there is a sale and delivery of personal property in presenti with express warranty, and the property turns out to be defective, the vendee may receive and use the property and sue for damages on a breach of the warranty, or, when sued for the purchase price, he may recoup such damages under the general issue, or set them up in a special plea of set off. This is a well settled rule."

Where there is a warranty of goods sold, without fraud, and the goods have been accepted and there is no stipulation in the contract that they may be returned, the

vendee has no right to annul the contract without the consent of the vendor, for a breach of warranty. But when he is sued for the purchase price, he may recoup the damages sustained by reason of the breach of warranty. (Doane v. Dunham, 65 Ill. 312; Harris v. Alfred, 158 Ill. App. 158; Rekheim Mfg. Co. v. Steylan, 142 Ill. App. 198.) The measure of damages for breach of warranty is the difference between the value of the article as warranted, and its actual value in its alleged defective condition. (Meyer v. Automobile Exchange, 125 Ill. App. 648; Skinner v. Sullivan, 56 Ill. App. 47.)

In the case at bar, the machine was sold and delivered, and there is no contention that there was any fraud connected with such sale. The defendant, therefore, could not annul the sale by returning the machine without the consent of the plaintiff. No evidence was introduced tending in any manner to show the amount of the damages sustained by the defendant on account of the alleged breach of the warranty. In this state of the record, the breach of warranty is of no consequence.

The defendant's second contention that the plaintiff cannot maintain this suit, for the reason that it was a foreign corporation and was not authorized to transact business in this state, is also without merit. The contention is made by the plaintiff that the defendant failed to establish the fact that the plaintiff was not authorized to transact business in this state. In the view we take of the case, we shall assume that the plaintiff was a foreign corporation and was not authorized to do business in this state. The soliciting of orders in this state by

the agents of the plaintiff does not constitute doing business as contemplated by the statute. Boos v. Texas & Pacific Ry. Co., 250 Ill. 376; Alpena Cement Co. v. Jenkins & Reynolds Co., 244 Ill. 354; Art Works v. Picture Frame Works, 264 Ill. 610.

Finding no reversible error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

133 - 21160

ROBERT B. COCHRANE and LUMAN H. COCHRANE, doing business as COCHRANE BROKERAGE COMPANY,

Plaintiffs in Error,

vs.

CHICAGO GREAT WESTERN RAILROAD COMPANY, a corporation,

Defendant in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiffs in error, hereinafter called the plaintiffs, brought an action of the 4th class in the Municipal Court of Chicago, against the defendant in error, hereinafter called the defendant, to recover for loss and damage to a carload of pears shipped by plaintiffs over defendant's road from Kansas City, Missouri, to Marshalltown, Iowa, October 10, 1913. At the close of the plaintiffs' evidence, the trial court held that a prima facie case had not been shown, and a judgment was entered against the plaintiffs for costs. This writ of error is prosecuted to reverse said judgment.

Plaintiffs' statement of claim alleged, in substance, the shipment of the pears by the plaintiffs over defendant's road from Kansas City, Missouri, to Marshalltown, Iowa; that the pears were in first-class merchantable condition at the time of shipment; that upon their arrival at destination they were found to be in bad condition and unmerchantable; and that plaintiffs suffered damages in the sum of $1000.

Defendant's affidavit of merits admitted the shipment of the pears by the plaintiffs over the defendant's road, but denied that any loss or damage was sustained to the shipment while in the possession, custody or control of the defendant; denied that, at the time of shipment, the pears were in a first-class merchantable condition, and alleged that the same were in a damaged and unmerchantable condition when delivered to defendant for shipment. Defendant further denied that it was indebted to the plaintiffs in any sum or sums whatever, by reason of the matters and things alleged in plaintiffs' statement of claim.

The evidence ~~tende~~ tended to show that the pears, when loaded at Kansas City, were in good condition; that the car in which they were loaded, during the trip to Marshalltown, was not properly ventilated; that when the car arrived at Marshalltown the pears were in a damaged condition; that the amount of damage suffered by the plaintiffs by reason of the manner in which the pears were transported was $293.55.

At the close of the plaintiffs' case, the court found the issues for the defendant on the ground that it was incumbent upon the plaintiffs to produce a bill of lading, or satisfactorily account for its absence. The defendant contended that, as this was an inter-state shipment, and governed by the federal law which requires the issuance of a bill of lading, in the absence of proof to the contrary, it will be presumed that a bill of lading was issued when the shipment was delivered to the defendant; and that it was therefore necessary for the plaintiffs to have either pro-

duced the bill of lading or satisfactorily accounted for its absence before they could recover. In this contention we cannot concur. The plaintiffs relied upon an oral contract. The defendant could not relieve itself from liability by its failure to issue a receipt or bill of lading. In Gamble-Robinson Co. v. U.P. R. R. Co. 268 Ill.400, the court say (p.404): "The amendment to the Inter-State Commerce act referred to, makes it the duty of a railroad company receiving property for transportation from a point in one State to a point in another State to issue a receipt or bill of lading therefor. But the liability imposed by the act is not dependent upon the issue of such receipt or bill of lading. The liability is created by the railroad company receiving and agreeing to the shipment of the property. The receipt or bill of lading is evidence of the contract but its issuance is not necessary to create the liability. It is expressly provided that no contract, receipt, rule or regulation shall exempt the railroad company from the liability imposed. It seems obvious that the railroad company cannot be permitted to relieve itself of liability by failing to perform its duty in the issuance of the bill of lading." In that case it was held that it was not necessary for the plaintiff to introduce a bill of lading in order to recover.

Under the facts in the case at bar, we are of the opinion that it was not incumbent upon the plaintiffs to produce, or account for the absence of a bill of lading before they could recover. It nowhere appears that a bill of lading was in fact issued. The question was not raised by the pleadings or the evidence, and the defendant made no objection to the evidence introduced by the plaintiffs, which tended to prove an oral contract, and we are clearly of the opinion that

the evidence introduced by the plaintiffs was sufficient to establish a contract between the parties for the transportation of the pears.

The contention made by the defendant that the plaintiffs have not shown that the claim for damages in this case is owned by them is without merit.

In view of all the facts shown by the evidence, and admitted by the pleadings, we are clearly of the opinion that plaintiffs made out a prima facie case, and the court erred in not so holding. The judgment of the Municipal Court of Chicago will, therefore, be reversed and the cause remanded.

REVERSED AND REMANDED.

615 - 22013

PETER HAND BREWING COMPANY,
a corporation,
Appellee,

vs.

M. H. SCHMITZ and ANDREW
SCHMITZ,
Appellants.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

199 I.A. 472

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The errors assigned on this appeal relate wholly to matters that can be made to appear only by a bill of exceptions which the record does not contain. Nothing therefore is presented for review. Hence, a motion to affirm the judgment is properly made and will be granted.

AFFIRMED.

616 - 22014

PETER HAND BREWING COMPANY, a corporation, Appellee, vs. MICHAEL H. SCHMITZ and ANNIE J. SCHMITZ, Appellants.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

199 I.A. 473

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The errors assigned on this appeal relate wholly to matters that can be made to appear only by a bill of exceptions which the record does not contain. Nothing therefore is presented for review. Hence, a motion to affirm the judgment is properly made and will be granted.

AFFIRMED.

80 - 21917

PACIFIC EXPRESS COMPANY, Appellee, vs. SPAULDING & COMPANY, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

199 I.A. 474

MR. PRESIDING JUSTICE McSURELY

DELIVERED THE OPINION OF THE COURT.

Plaintiff, a common carrier, brought suit alleging that defendant delivered to it a parcel for shipment and wrongfully stated its value to be not exceeding $50; that it was consigned to Henry Plaff, of El Paso, Texas; that while in transit it was destroyed, through no fault of plaintiff; that Plaff brought suit against the plaintiff Express Company for the value of the contents of the parcel and had judgment for $538, which on appeal was affirmed, and subsequently the Express Company paid said judgment with interest and costs. It was further alleged that plaintiff, a common carrier, was obligated for a less degree of care during transit for goods valued at $50 or less than for goods of greater value, and because of the value wrongfully placed on said parcel by defendant plaintiff gave the less degree of care to the parcel, hence its destruction; that this was fraud and deceit on the part of defendant which caused plaintiff to sustain damages. Upon trial by the court plaintiff had judgment.

The evidence shows that the shipping clerk for defendant delivered the parcel to plaintiff for shipment and took from plaintiff a receipt; that plaintiff did not ask for any valuation of the goods and no value was given. The printed receipt contains this:

"The said Pacific Express Company shall not be liable for * * * Nor for any loss or damage to said property exceeding the sum of $50 which sum, or any other sum herein stated, is the value of the property agreed upon as the basis of charges for the service undertaken, and to which the charges are in fact graduated, and the risk of this company limited, unless the just and true value thereof is otherwise herein stated."

The shipping clerk testified he was familiar with the terms of the receipt. There was other evidence offered tending to show knowledge on the part of the defendant of this provision. The court refused to admit this evidence, which we think was error, but in our consideration we have assumed it as proven that defendant had knowledge of the terms of the receipt in this respect. The most that legally can be claimed for this provision is a limit on the amount for which the Express Company would be answerable to the consignor, Spaulding & Company, in any claim made by the consignor for reimbursement for loss. This, however, is a matter between the consignor and the Express Company only. The consignor might well be willing to limit the amount of its loss for the reason that when it delivered the parcel to the carrier the goods became the property of the consignee, Plaff, who only could recover for any loss in transit caused by the negligence of the carrier. Nonotuck Silk Co. v. Adams Express Co., 256 Ill. 66. The consignee was not bound by the terms of the receipt. Plaff v. Pacific Express Co., 251 Ill. 243. Mere acquiescence by the consignor in the terms of limitation of liability in the receipt cannot be held to be such a misrepresentation as to value as to amount to fraud and deceit. There being no fraud or deceit, the action cannot be maintained.

Another complete answer to plaintiff's claim is that it has been adjudicated that the loss in question was caused by the negligence of plaintiff. Plaff v. Pacific Express Co., 251 Ill. 243. Manifestly plaintiff cannot recover

from defendant damages arising from its own negligence which it has been obliged to pay.

Plaintiff has assigned cross-errors in this court touching the rulings of the trial court upon evidence and upon propositions of law, but even if we should be of the opinion that all of the assignments of cross-errors were meritorious, our ultimate conclusion that there can be no recovery in this case would still remain.

For the reasons above indicated the judgment is reversed and judgment of nil capiat is entered in this court.

REVERSED.

118 - 22061

F. C. EDGERTON, for use of I. V. EDGERTON, Defendant in Error, vs. GRAND TRUNK WESTERN RAILWAY COMPANY, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

199 I.A. 479

MR. PRESIDING JUSTICE McSURELY

DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for compensation for losses on a car of poultry shipped from a point in the state of Michigan to New York City, alleged to be caused by the failure of defendant to perform its contract of hauling so that the car would arrive at destination by a certain time. Upon trial by the court plaintiff had judgment for $424.95.

This shipment originated at Mount Pleasant, Michigan; there it was received by the Ann Arbor railroad, which issued its through bill of lading to destination; the Ann Arbor railroad hauled it to Imlay City, Michigan, there connecting with defendant's road, which hauled it to Black Rock, New York, and there turned it over to the Delaware, Lackawanna & Western railway, which transported it to destination, New York City. Plaintiff says that defendant, through its agent at Imlay City, orally agreed to haul the car from that point on a certain train, No. 90, leaving early in the morning, but it failed to do so and hauled it on a later train, thus causing it to arrive at destination too late for a market, with ensuing loss.

Defendant requested the court to hold as a proposition of law that:

"Under the Carmack Amendment to the Interstate Commerce Act the remedy of a shipper for loss or damage to property delivered to an initial carrier, which issues its through bill of lading to the shipper for interstate transportation over several lines and which property is delayed while in the hands of a connecting carrier, is against the initial carrier alone and not against the connecting carrier."

The court marked this "Refused." In so doing we are of the opinion that the court was in error as the proposition correctly states the law. It has been so decided in the recent case of Looney v. Oregon Short Line Railroad Co., 271 Ill. 538, found in the advance sheets of March 8, 1916. After reading the opinion in this case, and also the opinion in the same case by one of the branches of this court, it is clear that the Supreme Court has decided that even where there has been delay or failure on the part of a connecting carrier the shipper must bring his action against the initial carrier alone and not against the connecting carrier.

Decisions from State courts do not avail, as it has been held that the Carmack Amendment supersedes all regulations and policies of the different states. Adams Express Co. v. Croninger, 226 U. S. 491; Gamble-Robinson Co. v. Union Pacific R. R. Co., 264 Ill. 400. This court has followed these decisions in Idaho Sheep Co. v. Oregon Short Line R. R. Co., 188 Ill. App. 591. The affidavit of defense is sufficient to raise this point, as it specifically avers that the damages, "if any, are not chargeable in any way to the defendant." In Laskey v. Mendelson, 191 Ill. App. 597, we have held that a defendant is not required to set forth his evidence in his affidavit of defense. In Leonard Co. v. Union Pacific R. R. Co., 180 Ill. App. 415, cited by plaintiff, the court had under consideration an affidavit of defense wholly unlike the affidavit in the instant case.

"Under the Carmack Amendment to the Interstate Commerce Act the remedy of a shipper for loss or damage to property delivered to an initial carrier, which issues one through bill of lading to the shipper for interstate transportation over several lines and which provides a recovery, while in the hands of a connecting carrier, is against the initial carrier alone and not against the connecting carrier."

The court marked this "Relevant." In so doing, as far as the opinion shows, the court was in error as the transportation certainly states the law. It has been so treated in the recent case of Lowery v. Oregon Short Line Railroad Co., 271 U.S. 568, found in the advance sheets of Lawyers, Ed. Note. After reading the opinion in this case, and also the opinion in the same case by one of the brethren of this court, it is clear that the Supreme Court has decided that even if there has been delay or fault on the part of a connecting carrier the shipper must bring his action against the initial carrier alone and not against the connecting carrier.

Decisions from State courts do not avail, as it has been held upon the Carmack Amendment construing its regulations and policies of the different courts. Adams Express Co. v. Croninger, [illegible] Illinois R. R. Co., 226 U.S. 491, 4[illegible]. This court has followed these decisions in Adams Express Co. v. Croninger, [illegible] U.S. 491, 4[illegible]. 501. The criterion of decision is sufficient to [illegible], as it [illegible] "if any, not contemplated in the contract of carriage." In Lackey v. Kansas, 181 U.S. 548, 5[illegible], it was held that a railroad is not required to set forth the [illegible] in its bill of lading. [illegible] Illinois R. R. Co., [illegible] U.S. [illegible] (1[illegible]) [illegible] indication on affidavit of defense [illegible] in the instant case.

Other matters of defense are presented to us, some of which are not without merit, but in view of what we have heretofore said it is unnecessary to discuss them.

We hold that the decision in Looney v. Oregon Short Line R. R. Co., supra, is decisive against the claim of plaintiff and there can be no recovery against this defendant. Therefore the judgment is reversed without remanding.

REVERSED.

130 - 22074

ALBERT L. VON DEGENS, Plaintiff in Error, vs. LILLIAN VON DEGENS, Defendant in Error.	ERROR TO CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Complainant filed his bill of complaint asking for a divorce from his wife on the ground that she had been guilty of extreme and repeated cruelty towards him. Upon hearing he testified as to the alleged acts of cruelty, and was corroborated to a certain extent by the testimony of his two sons. After hearing the court ordered the bill dismissed for want of equity. We are of the opinion that this order was proper.

In Duberstein v. Duberstein, 171 Ill. 133, our Supreme Court said:

> "It is now a settled rule in this State, that, where the husband asks for a divorce from his wife upon the ground of extreme and repeated cruelty, he must make out a clear case; and it is not sufficient for him to show slight acts of violence on her part towards him, so long as there is no reason to suppose that he cannot protect himself by a proper exercise of his marital powers."

To the same effect is Aurand v. Aurand, 157 Ill. 321, Garrett v. Garrett, 252 Ill. 318, and many other cases.

The occurrences testified to by complainant do not at all approach in violence or seriousness the acts which the wife committed in the Duberstein case, supra, and which the Supreme Court held did not establish acts of cruelty sufficient for a divorce.

The order of the court, being fully justified under the evidence, is affirmed.

AFFIRMED.

Complainant filed his bill of complaint praying for a divorce from his wife on the ground that she was guilty of extreme and repeated cruelty towards him. Upon proving the qualified as to the alleged acts of cruelty, and was condoned to a certain extent by the forbearance of the complainant. After hearing the proofs counsel the trial judge [illegible] of cruelty. [illegible] of the opinion that [illegible] equity.

In Bodenstein v. Bodenstein, 171 Ill. 134, our Supreme Court held:

"It is now a settled rule in this state, that, where the husband made [illegible] a divorce from the wife [illegible] ground of extreme and repeated cruelty, he must show [illegible] clear cases; and it is not sufficient for him to show slight acts of violence on her part towards him, or [illegible] is no reason to suppose that the husband [illegible] by a proper exercise of his marital power."

To the same effect is Hurnard v. Hurnard, 47 Ill. App. 1[illegible]; Barrett v. Barrett, 158 Ill. 328, and many other cases.

The concurrence [illegible] at all approach in violence or serious [illegible] will considered in the Bodenstein case, supra, [illegible] Supreme Court held did not constitute such or merely sufficient for a divorce.

The order of the court, being clearly justified under the evidence, is affirmed.

Affirmed.

324 - 22279

JOSEPH MASLO, by Stanislaw Maslo, his next friend, Defendant in Error, vs. FRANCISZKA MATYASIK, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

199 I.A. 482

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This writ of error brings in review the record in a suit brought to recover damages for injuries said to have been inflicted upon Joseph Maslo, an infant, by the defendant. Upon trial before a jury a verdict was returned against defendant for $400, upon which judgment was entered.

The only question for determination is one of fact. Did Franciszka Matyasik, defendant, throw a brick striking Joseph Maslo, six years old, on the head, inflicting the injuries complained of? A witness testified positively that he saw the defendant throw the brick striking the child, and there was evidence tending to corroborate his story, including the testimony of one witness as to an admission by the defendant. Defendant testified denying that she threw the missile, and was supported by the testimony of a son, who stated that when other boys were throwing bricks at him he threw the brick and by mistake struck plaintiff. The variant stories of the witnesses were considered by the jury, who were evidently of the opinion that greater credence was to be given to the testimony tending to support the claim of plaintiff. We are unable to say that this conclusion is manifestly against the weight of the evidence; therefore we shall not disturb the verdict.

Complaint is made of the rulings of the trial judge upon evidence, but we hold that no reversible error has been committed. It was proper to sustain the objection to the question touching the general reputation of one of plaintiff's witnesses, for the reason that the question was improper in form in that it inquired "whether he will tell the truth or not." This is not the proper form of question to be put to a reputation witness. It was also proper to sustain objections to questions tending to develop that one of the witnesses had made other statements contrary to his testimony on the stand, without giving the witness sought to be impeached an opportunity to deny or affirm that he had made such statements.

The objection to instruction No. 5 is without merit. It did not assume any fact, but predicated the assessment of damages upon injuries, if any were proven from the evidence.

We cannot say that the verdict was excessive. The physicians testified as to the infliction of a cut on the head about an inch in length which required stitches. There was other evidence tending to show a condition of shock, with resulting impairment of the child's nervous system.

We see no reason to reverse the judgment, and it is affirmed.

AFFIRMED.

24 - 21602

F. THOMAS KALECKI,
Defendant in Error,

vs.

JULIUS N. HELDMAN,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

199 I.A. 484

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This writ of error brings in review a judgment for $105 recovered by plaintiff Kalecki against defendant Heldman in the Municipal Court.

The motion to dismiss the writ of error reserved to the hearing will be denied.

The question in the case is one of fact, on which the testimony is conflicting. Plaintiff testified that defendant employed him to work for the Central Trust Company in a case in which defendant represented certain creditors of the Woolen Mills Company, a bankrupt, and the Trust Company was receiver of the bankrupt, and promised to pay him five dollars per day out of his own pocket for such services. Defendant testified that he did not employ plaintiff nor promise to pay him any sum whatever out of his own pocket. The clerk's record shows a verdict for plaintiff for $105 entered February 25, 1915; that the defendant moved the court for a new trial and after several postponements the motion was heard and denied May 1, 1915. It has been uniformly held that if the bill of exceptions (or stenographic report) does not show that the motion for a new trial was made and overruled and an exception taken, the court will not investigate whether the evidence sustains the verdict. C. C. & F. R. V. R. R. Co. v. McMath, 91 Ill. 104. This rule of law disposes of the motion found in the clerk's

record, but not in the stenographic report, for a new trial. C. C. & F. R. V. R. R. Co. v. McMath, supra.

The court cannot consider objections to instructions, for no objection was made to them in the trial court nor any instruction asked for by defendant and refused. Yerber v. C. & A. Ry. Co., 235 Ill. 589, 597.

The record is free from error and the judgment is affirmed.

AFFIRMED.

52 - 21767

PEOPLE OF THE STATE OF ILLINOIS ex rel. JOHN J. LYNCH and A. COCHRANE (Petitioners), Appellee,	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.
vs.	
WILLIAM HALE THOMPSON, Mayor of Chicago (Respondent), Appellant.	

199 I.A. 485

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This is an appeal by the respondent, the mayor of Chicago, from an order entered August 16, 1915, directing him to issue a dramshop license to petitioners to keep a dramshop at 2000 Wabash avenue. Petitioners have not entered their appearance in the case. The officer authorized to issue dramshop licenses is entrusted by the statute with discretion in the issuing of such licenses. Harrison v. People, 222 Ill. 150; Kretzmann v. Dunne, 226 id. 31. There is in the record no evidence tending to show that the respondent refused to issue the license through fraud or an arbitrary exercise of discretion, and in the absence of such evidence the officer is entrusted with the discretion to determine whether the proposed location of a saloon is in a suitable place, and the court can not interfere with the exercise of such discretion. The court erred in sustaining the demurrer to respondent's answer and for that error the order appealed from will be reversed. The term for which the license was applied for ran from May 1 to October 31, 1915. The term expired before the hearing of the appeal, for the record was not filed until January 10, 1916. The effect of an order of affirmance would therefore be unavailing and fruitless and for that reason the judgment will be reversed. People v. City of Streator, 250 Ill. 47.

The order appealed from will be reversed and

the cause remanded with directions to overrule the demurrer to respondent's answer and dismiss the petition.

REVERSED AND REMANDED
WITH DIRECTIONS.

98 - 22025

ALBERT E. WILSON, Admr. of the Estate of WILLIAM WHITE WILSON, deceased,
Appellee,

vs.

CHICAGO CITY RAILWAY CO.,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

199 I.A. 487

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant railway company from a judgment for $3000 recovered by the plaintiff as administrator of the Rev. William White Wilson, for damages sustained by his widow, heirs, and next of kin, by reason of his death through the alleged negligence of the defendant.

Defendant operated on 43rd street a double track electric street railway and also one on Cottage Grove avenue. A train came from the west on the south side of 43rd street and stopped west of the cross-walk to discharge passengers. The deceased was first seen on the southeast corner. He stepped down from the curb and started to cross to the north side of 43rd street. A car was going north on the east track in Cottage Grove avenue and reached the crossing in advance of the car on 43rd street. In crossing the track on 43rd street deceased was struck by the eastbound car on that street and killed. The causes of action set forth in the declaration are: 1st. That defendant was carelessly, etc., running one of its cars in 43rd street at its intersection with Cottage Grove avenue; that while plaintiff's intestate in the exercise of due care and caution for his own safety was crossing 43rd street on the east side of Cottage Grove

avenue, he was struck by defendant's car and so injured that he died. The negligence charged in the second count is in carelessly and negligently driving the car across the intersection without ringing a bell or giving any warning. The negligence charged in the third count is driving the car across the intersection at a speed of fifteen miles an hour without ringing a bell or sounding a warning. The negligence charged in the fourth count is running the car at a speed of fifteen miles an hour. The negligence charged in the fifth count is that while driving the car across the intersection the motorman was not looking out for pedestrians who might be crossing. The negligence charged in the sixth count is in wilfully, wantonly, and with gross negligence driving the car against plaintiff's intestate. The seventh and eighth counts relate to fenders and may be disregarded.

The distance from building line to building line in Cottage Grove avenue is about 80 feet and the sidewalk is about 30 feet wide. The distance from the south curb of 43rd street to the first rail of the track in that street is about 10 feet. The car that struck Mr. Wilson was what is known as a single track summer car.

Whether a bell was rung or gong sounded on the 43rd street car was a question on which the evidence is conflicting and the verdict of the jury must be held conclusive. The evidence as to the speed of the car is also conflicting. Witnesses for the plaintiff testified that the speed was from 8 to 15 or 20 miles an hour, while witnesses for defendant testified that the speed was 3 or 4 miles an hour. The rate of speed of the car is also a question of fact for the jury, on which their verdict cannot be disturbed.

There is evidence tending to show that the motorman first looked north and then looked south. The eastbound car crossed the northbound Cottage Grove avenue track close behind the northbound car on that track. There is evidence that the progress of deceased across the eastbound track in 43rd street was impeded by a westbound car or other vehicle, and that deceased attempted to go back to the south to escape the eastbound car, but that because of the rate of speed of that car and because the motorman was looking north he did not see the deceased until it was too late to stop the car and avoid striking him. "This Court has repeatedly held that a traveler approaching a railroad crossing is required to use such care as a person of ordinary prudence would exercise under the same circumstances, and this ordinarily demands the use of the faculties of sight and hearing to discover whether a train is approaching or not; but it can not be said as a matter of law that the failure to look or listen under all circumstances will bar recovery. It is usually a question of fact for the jury to determine in view of all the surrounding circumstances what constitutes negligence or want of due care." Winn v. C. C. C. & St. L. Ry. Co., 259 Ill. 132; Partlow v. I. C. R. R. Co., 150 Id. 321.

If the jury found, as we have held that they might properly, that the evidence fails to show that a bell was rung or gong sounded and that the 43rd street car was running at an improper rate of speed, a prima facie case of negligence was established against defendant. "Such presumption may be rebutted, but the question whether the appellant's evidence was sufficient under all the circumstances to overcome the prima facie proof of negligence, was a question

for the jury and was properly submitted to the jury, and the judgment of affirmance by the Appellate Court is conclusive." Partlow v. I. C. R. R. Co., supra.

In our opinion there was no substantial error committed by the court and on the whole record we find no error that would justify a reversal of the judgment.

The judgment of the Superior Court is affirmed.

AFFIRMED.

114 - 22056

BESSIE McCONNELL, Appellee, vs. CHICAGO RAILWAYS COMPANY and HERBERT HINCHLIFFE, doing business as H. Hinchliffe Teaming Company, Appellant.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

199 I.A. 490

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

The plaintiff, in an action of tort for personal injuries alleged to have been sustained through the negligence of both defendants to the suit, had a verdict against both for $9,000 damages, and to reverse the judgment entered on the verdict defendants prosecute separate appeals. The defendant Railways Company operated a street railway in Madison street. A west-bound street car in the north-bound track of the railway stopped to discharge and receive passengers, with the front end of the car at or near the east line of Halsted street. Plaintiff started to cross Madison street from the southeast corner of Halsted and Madison streets, and when she reached the center of the east-bound track saw a west-bound car of defendant coming to a stop. After the car had stopped she walked in front of the car and then east alongside of it to about the center of the car; she then saw a team coming toward her, which was then 25 or 30 feet east of the rear end of the car. The entrance to the car was at the rear end, and she walked to the rear vestibule and started to get on. She testified that she placed her right foot on the step, took hold of the iron stanchion at the outer end of the rail which

divided the rear platform, stepped on the platform with her left foot, when the car started with a jerk and she was thrown backward into the street. Two teams of defendant Hinchliffe were going west north of the north-bound rail of the track in which the car ran. The front team was driven by Sibley, who was not called as a witness, and the rear one was driven by Forrest Hinchliffe, a brother of defendant Hinchliffe. He testified that plaintiff was 20 or 25 feet in front of the hind wheels of Sibley's wagon when she fell, and that the wagon could not have run over her leg. Opposed to this testimony is the testimony of Silver and Taylor that they saw the hind wheel of the wagon run over plaintiff's leg, and the testimony of the surgeon that both bones of the right leg were broken and the left leg injured. From the evidence the jury might properly find that the plaintiff was thrown from the car in front of or alongside of Sibley's wagon through the negligent starting of the car, and that the leg was run over and broken by the wheel of Sibley's wagon.

Whether the defendant Railways Company was guilty of negligence in starting its car which caused or contributed to plaintiff's injury, and whether Sibley the driver of the Hinchliffe wagon, was guilty of negligence which caused or contributed to plaintiff's injury, were questions of fact for the jury. According to plaintiff's theory of the facts, Sibley might have avoided the accident by turning out to the north or stopping in time. His conduct must be measured by the usual standard - could he have avoided a collision by the exercise of ordinary care? The jury decided that he could not, and the contrary does not conclusively appear from the evidence.

The issue of negligence was submitted to the jury, and by instruction 33 the jury were instructed as to

probable cause, and the defendant Railways Company having submitted this issue to the jury cannot now assert that it was not presented by the pleadings. The Railways Company was fully advised of what issues it had to meet and that it did attempt to meet them is shown by the facts it presented and the instructions it submitted. In Wheeler v. C. & W. I. R. R. Co., 267 Ill., 306, the declaration charged that the plaintiff went to work with an engine, "knowing that it had not been repaired." This allegation should have read, - "not knowing that it had not been repaired," and the declaration as it actually stood was bad on demurrer, since it clearly showed an assumption of risk by the plaintiff. A motion in arrest of judgment was interposed, but overruled, and in upholding the action of the court in that respect the Supreme Court said:

"The reading of the whole count leaves no room for doubt as to its real meaning, and when the same is considered in connection with the evidence and instructions of the court, there can be no question but that the jury understood that in order for plaintiff to recover under that count, the jury must find from the evidence that plaintiff did not know, up to the time of the injury, that the repairs had not been made on the engine."

So in the case at bar, the reading of the whole count as it stood before amendment, and particularly as it stood after amendment, leaves no room for doubt as to its real meaning, namely, that the Railways Company so negligently operated its car and Hinchliffe so negligently operated his wagon as to cause the injury complained of. The court then in the Wheeler case proceeds:

"The whole record shows the count was so treated by all the parties to the suit until after the jury returned their verdict, as both parties in their instructions treated the count as so alleging and submitted instructions to the jury declaring the rules of law applicable to the evidence admissible under such a count. Where both parties to a suit submit instructions declaring the rules of law applicable to the facts proven and request the jury to return their verdict in accordance with those rules of law as applied to the facts proven, neither party can be heard

to complain that such facts were not within the scope of the allegations of the pleadings under which those facts were permitted to be proven."

The rule stated in Illinois Terra Cotta Co. v. Hanley, 214 Ill. 243, is that a defect which would be fatal on demurrer is cured by verdict where the issue joined is such as necessarily requires proof of the facts imperfectly stated, or even wholly omitted, and without which proof it is not to be presumed the judge would have directed or the jury have returned the verdict.

The contention of the Railways Company is that, while the declaration charges negligence against both defendants, still it does not allege any causal connection between the negligence of the company and the accident. The count is as follows:

"Plaintiff further avers that while standing at said intersection as aforesaid, one of the defendant's Chicago Railways Company's cars stopped at said intersection, for the purpose of receiving and discharging passengers, and while so stopped, plaintiff attempted to board said car, and while so doing, the defendant Chicago Railways Company negligently and carelessly started said car, and the defendant Herbert T. Hinchliffe by his servants then and there in charge of said horses and wagon, negligently and carelessly drove, operated and managed said horses and wagon, so as to cause same to collide with plaintiff.

Plaintiff further avers that she was then and thereby severely, dangerously and permanently injured," etc.

As amended the last paragraph commences as follows:

"Plaintiff further avers that she was then and thereby as a result of the negligence of said defendants and each of them as above alleged, severely, dangerously and permanently injured both internally and externally."

In other words, the allegation is that the Railways Company started the car and Hinchliffe drove the team "so as to cause" the accident, and so there is clearly an allegation of causal connection.

But if it be assumed there was no allegation of causal connection, still that would not be ground for arresting the judgment. This is held in Illinois Terra Cotta Co. v. Manley, 214 Ill. 343, 344; Sargent Co. v. Baublis, 215 Ill. 428, 431, 434; Grace & Hyde Co. v. Danborn, 235 Ill., 136; City of Danville v. Porterfield, 138 Ill. 114, 120.

In the Baublis case (215 Ill. at 430) it is said:

"On demurrer a declaration is construed against the pleader, but after verdict all intendments and presumptions are in its favor. If a declaration contains terms sufficiently general to include, by fair and reasonable intendment, any matter necessary to be proved and without proof of which the jury could not have given the verdict, the want of an express averment of such matter is cured by the verdict."

Here the duty rested on the conductor to use the highest degree of care and caution to see that plaintiff was not put in danger by the starting of the car; and upon the teamster rested the duty to see if by driving between the car and the curb he was endangering those attempting to get on or off the car. Wolff Mfg. Co. v. Wilson, 152 Ill. 9; Wheeler v. C. & W. I. R. R. Co., supra.

Technical objections are made to instructions 10 and 16 given for the plaintiff. The error complained of in instruction 10 is the insertion of the word "of" in place of the word "or" in the clause wherein the court evidently intended to state to the jury that they might consider the probability or improbability of the truth of the statements of witnesses, etc., and in instruction 16 the omission of the word "if" in the sentence, "The court instructs the jury that 'if' you find for the plaintiff you will then be required to determine the amount of her damages. The argument of counsel is disposed of by Wheeler v. C. & W. I.

R. R. Co., supra, where it was held that in view of the language of the court the omission of the word "not" from the declaration could not have misled the jury, since a reading of the whole count left no doubt as to its real meaning.

We do not think that on the evidence in this record the award of $9,000 damages can be called excessive. Upon the evidence in the record we think that the jury might properly find that the negligence of both defendants was clearly established, as well as the causal connection of each with the injury, and the judgment will be affirmed.

AFFIRMED.

125 - 22068

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. Josephine Zebert, Defendant in Error, vs. FELIX J. LUBIN, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

199 I.A. 494

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This writ of error is prosecuted to reverse a judgment for plaintiff in a prosecution for bastardy. The case has been twice tried, and the contention of plaintiff in error is that the finding of the court is against the evidence. The testimony of the complaining witness was that respondent had intercourse with her at Indiana Harbor December 31, 1913, and also some time before Christmas of the same year at the house of Mrs. Gilson, where she was employed. Respondent testified that he did not have intercourse with the complaining witness at any time, and the evidence tended to show that he was not at Indiana Harbor at the time the complaining witness testified that he had intercourse with her there. If it be admitted that the preponderance of the evidence is that he did not have intercourse with complaining witness at Indiana Harbor, there remains her testimony that he had intercourse with her at the house of Mrs. Gilson in December, and the testimony of Mrs. and Mr. Gilson that a week or two before Christmas respondent came to their house and they went to a show leaving the respondent and complaining witness alone in the house.

Two witnesses other than respondent testified to having intercourse with the complaining witness. They

were contradicted by her, and it was testified that one of them admitted that his statement was false and that he wanted to help respondent. The trial Judge saw the witnesses and heard them testify, and if he saw fit to believe the testimony of complaining witness instead of that of the man Dravich, who, according to the testimony of Seibert, testified to his own shame to help his friend, there is no reason why we should say that he was wrong in his finding, especially in view of the testimony of the Gilsons as to the opportunity afforded the parties. In such a condition of the evidence we are not disposed to interfere.

Finding no reversible error in the record and proceedings of the Municipal Court, the judgment will be affirmed.

AFFIRMED.

149 - 22697

GEORGE J. WILLIAMS,
Plaintiff in Error,

vs.

C. A. WRIGLEY,
Defendant in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

199 I.A. 495

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This writ of error is prosecuted to reverse a judgment of nil capiat rendered in an action by plaintiff Williams against defendant Wrigley, for rent for June and July, 1915, under a written lease. A judgment by confession was entered, which was opened and the cause submitted to a jury. Defendant in error Wrigley failed to file a brief or argument.

The grounds of reversal relate to the written lease, but the abstract fails to set out the lease; "under such circumstances the court does not search the record to ascertain the issues, but acts entirely on the abstract." DesPlaines v. Winkelman, 270 Ill. 149, 159. "An abstract must be full and complete and in accordance with the rules of the court. The court will not explore the record to find errors to sustain the assignments of error. People v. Yuskauskas, 268 id. 328; Gibler v. Mattoon, 167 id. 18; Gilman v. People, 178 id. 19; Hobbs v. People, 183 id. 536." Leroy v. Scott, No. 21632, opinion filed April 10, 1916.

The abstract failing to show any error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

GEORGE T. WILLIAMS,
Plaintiff in Error,

vs.

T. A. WILLIAMS,
Defendant in Error.

ERROR TO DISTRICT CT.

No. 1113

MR. JUSTICE DARR DELIVERED THE OPINION OF THE COURT.

This a writ of error is prosecuted to reverse a judgment of nil capiat rendered in an action by plaintiff against defendant singly, for some few days in July, 1915, under a written lease. A judgment by confession was entered, which was opened and the cause submitted to a jury. Defendant in error simply failed to file a single affirmative.

The grounds of reversal relate to the written lease, but the assignment fails to set out the lease; "under such circumstances the court does not assume and refuse to ascertain the issues, but acts entirely on the contract." Deatherage v. Hinkelman, 27 Tex. 111, 122, 123. "A contract must be full and complete and in consideration upon the trial of the court. The courts will not exercise the power to find errors to sustain the assignments of error." Lewis v. Underwood, 255 Tex. 352; Gilmer v. Mathews, 107 Tex. 1; Gilmer v. Zeigle, 178 Id. 19; Power v. Power, 100 Tex. 1; Berry v. Scott, 80 Tex. 2128, opinion filed April 6, 1891.

The assignment failing to show an error in the record, the judgment of the Commission Court is affirmed.

152 - 22100

LADISLAW J. TUPY, Defendant in Error,	)	
	)	ERROR TO MUNICIPAL COURT
vs.	)	
	)	OF CHICAGO.
FRANK CECH and ANNA CECH, Plaintiffs in Error.	)	

199 I.A. 496

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This writ of error brings in review a judgment of nil capiat rendered in an action brought by plaintiff Tupy against defendants, Frank and Anna Cech, to recover commissions on a sale of real estate to Joseph and Mary Kolar. The contentions of plaintiffs in error are: 1st, that the plaintiff failed to establish a contract of employment by the defendants to sell the real estate in question; 2nd, that the verdict is not supported by the evidence but is against the preponderance of the evidence. Whether the plaintiff established a contract of employment by the defendants and whether the verdict was against the preponderance of the evidence, were questions of fact for the jury, on which on the evidence in the record the verdict of the jury must be held conclusive. Plaintiff was corroborated in his testimony by the testimony of Joseph and Mary Kolar, the purchasers of the real estate, and was contradicted only by the testimony of Frank and Anna Cech. We think that the preponderance of the evidence is in favor of the plaintiff; but if not, it was for the jury to decide whether they would believe plaintiff and his witnesses or the defendants.

The record is free from error and the judgment will be affirmed.

AFFIRMED.

[illegible] v. [illegible],
Defendant in Error,

vs.

[illegible] and ANNA [illegible],
Plaintiffs in Error.

MEMOR TO [illegible] FROM
[illegible].

1931 A. 420

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE [illegible].

This writ of error brings in review a judgment of nil capiat rendered in an action brought by plaintiff [illegible] against defendants, Frank and Anna [illegible], to recover proceeds on a sale of real estate to Joseph and Mary [illegible]. The contentions of plaintiffs in error are: [illegible] plaintiff failed to establish a contract of employment by the defendants to sell the real estate in question; that the verdict is not supported by the evidence but is against the preponderance of the evidence. Whether the plaintiff established a contract of employment by the defendants and whether the verdict was against the preponderance of the evidence, were questions of fact for the jury, on which on the evidence in the record the verdict of the jury must be held conclusive. Plaintiff was corroborated in his testimony by the testimony of Joseph and Mary Polan, the purchasers of the real estate, and was contradicted only by the testimony of Frank and Anna [illegible]. We think that the preponderance of the evidence is in favor of the plaintiff; but if not, it was for the jury to decide whether they would believe plaintiff and his witnesses or the defendants.

The record is free from error and the judgment will be affirmed.

74 - 21884

BEN F. BARNETT, Appellee,	)	
	)	APPEAL FROM MUNICIPAL
vs.	)	
	)	COURT OF CHICAGO.
CALDWELL FURNITURE COMPANY, a corporation, Appellant.	)	

199 I.A. 510

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The controversy in this cause arises under a written contract of employment, whereby the defendant employed plaintiff as its salesman with the exclusive right to sell its product in certain portions of the United States from July 1, 1912, to June 30, 1914. Plaintiff undertook to sell $100,000 gross of defendant's output each year of the contract, and as compensation was to receive 6 per cent commission on the net price of all goods sold by himself or otherwise within the territory given him by the contract. Such commission was subject to be varied under stated conditions, commissions to be calculated upon orders accepted and filled by shipment. Plaintiff agreed to exert himself to the best of his ability in making sales, but did not agree not to take on other lines of work or to devote all of his time in and about the sale of defendant's furniture, etc. Plaintiff also claims that defendant sold within his territory $36,520.80 in value of its goods without his consent, and that he was discharged by defendant from its employment without any just or reasonable cause about April 24, 1913, and in this suit seeks to recover damages for defendant's so breaching the contract. Defendant contends that it did not discharge plaintiff - that he resigned his position and refused thereafter to serve defendant, although requested so to do, and that plaintiff did not perform his contract. On a

trial by consent of the parties before the court there was a finding for plaintiff and a judgment against defendant for $3483.69 and costs, and defendant appeals.

Defendant assigns error and argues -

1. That plaintiff did not comply with the contract on his part.

2. That the relationship between the parties was ended by mutual agreement.

3. That it does not appear that the plaintiff sustained any damages.

These contentions are mainly of fact and incidentally involve but one question of law, viz: the measure of plaintiff's damages and whether they were assessed under correct legal principles.

The trial court resolved all the questions of fact in favor of plaintiff, and while it would serve no useful purpose to recapitulate the testimony pro and con, we are unable to say that the finding of the court is contrary to the probative force of the evidence. The testimony is in sharp conflict. The credibility of the witnesses and the weight to be accorded to the testimony of each of them was a matter peculiarly within the province of the trial Judge. He saw the witnesses and observed their manner upon the witness stand - privileges not available to us - and was therefore better able than we are to judge of the weight to be given their testimony and to whom to give credence. The testimony of the witnesses for the plaintiff being without countervailing proof establishes his claim, and it was competent for the trial Judge to conclude, after all the proofs had been heard, that the case made by the plaintiff had not been overcome and that the preponderance of the proof was in

trial by consent of the parties before the court, and a finding for plaintiff and a judgment against defendant for $2625.00 and costs, was defendant appeals.

Defendant assigns error on the following -

1. That plaintiff did not meet the burden of proof imposed on his part.

2. That the contractual relation upon which the action was founded by mutual agreement.

3. That it was not error for the trial court to admit evidence of damages.

These contentions are mainly, if not the principal controlling issues in the decision of law, viz: the existence of plaintiff's damages and whether it was entitled under certain legal principles.

The trial court resolved all the questions of fact in favor of plaintiff, and will - if upon review it appears proper to reexamine the testimony [illegible] - the court's ruling to any that the finding of the court is conclusive in the probative force of the evidence. The decision is in many conflict. The credibility of the witnesses and the weight to be accorded to the testimony of each is for a matter peculiarly within the province of the trial court. In the new trial proceeds and observed upon [illegible] - and the need alone - privileges not available to us - and we therefore better able than we are to judge of the [illegible] given their testimony and to see in fact [illegible]. The testimony of the witnesses for the plaintiff [illegible] contradicting proof established for right, and if the trial court found for the plaintiff judge to continue, where it the trial had been [illegible], that the case made by the plaintiff and [illegible] been overcome and that the preponderance of the proof [illegible]

his favor. As said in Springer v. David Bradley Mfg. Co., 191 Ill. App. 45, "Where the trial court in a trial without a jury has had an opportunity of seeing the witnesses and of hearing their testimony as it is delivered orally, the findings of such court upon mere questions of fact, when the testimony is conflicting, will not ordinarily be disturbed on appeal unless such findings are clearly and manifestly against the preponderance of the evidence," citing cases. The rule is firmly established in this jurisdiction that where there is, as in this case, an irreconcilable conflict in the testimony, a court of review will not reverse the judgment of the trial court, where the evidence of the successful party, when considered by itself, is clearly sufficient to sustain the judgment. This rule environs this case, and the unyielding principle there stated is here invokable. We think the preponderance of the evidence establishes the fact that plaintiff did comply with the contract in every essential particular so far as defendant's conduct would permit, and that defendant discharged him without reasonable cause and without the legal right so to do; and further, that plaintiff did not withdraw from the contract or quit voluntarily the employ of defendant and that the contract was not terminated by the mutual agreement of the parties.

That plaintiff sustained damages by reason of defendant's discharging him from its employ fourteen months before the contract expired by efflux of time, we think is apparent from the record. True it is that plaintiff made more money after his discharge than before, but as he was not forbidden to engage in other pursuits during the life of the contract, his earnings whether less or more after his discharge, is no concern of defendant. His earnings after dis-

charge cannot be used in diminution of damages occasioned by defendant's breaching the contract.

It is quite clear that plaintiff's damages could not be ascertained with mathematical accuracy. However, it is certain that plaintiff suffered damages through defendant's breach of its contract with him. It is true that the amount of damages depended upon the sales plaintiff might effect in the last fourteen months of the term, and that such sales were necessarily uncertain, but even so, that is no reason why plaintiff should not recover damages. He must recover damages upon the most reasonable theory compatible with the situation. The guides for the future are the happenings of the past, and the trial Judge, in the admeasurement of damages, ascertained the amount of the net earnings of plaintiff during the preceding four months from his sales of defendant's furniture and assumed that the earnings for the last fourteen months would have averaged the same and upon this principle ascertained and assessed the damages. This is as near a just measure, the circumstances considered, as could well be adopted, and one which, we think, does justice between the parties. Defendant, because of its violation of its contract, cannot be permitted to escape liability because the amount of the damages it caused is uncertain. We think the damages admeasured are within the ruling of Keglenary v. Gebhardt, 187 Ill. App. 14, which involved, like the case at bar, a commission contract breached by the employer. It was there contended, as here, without avail, that the damages were too remote, speculative and uncertain to be capable of proof. In Wakeman v. Wheeler, 101 N. Y. 205, the court say;

"Most contracts are entered into with a view to future profits, and such profits are in the contemplation of the parties and so far as they can be proved they may form the measure of damages. As they are prospective, they

must to some extent, be uncertain and problematical, and yet on that account a person complaining of breach of contract is not to be deprived of all remedy. it is usually his right to prove the nature of his contract, the circumstances surrounding and following its breach and the consequences naturally and plainly traceable to it and then it is for the jury under proper instructions as to the rule of damages to determine the compensation to be awarded for the breach."

Spencer Medicine Co. v. Hall, 78 Ark.556.

The method adopted by the court in this case in the assessment of damages is warranted by precedent and is as fair a measure as the occasion and the circumstances would permit, and in our opinion does justice between the parties.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

315 - 31[illegible]

A. H. WHITSETT AND R. C. WHITSETT,
Co-partners, doing business as
R. C. WHITSETT COAL & MINING CO.,
Appellees,

vs.

CHICAGO WASHED COAL COMPANY,
Appellant.

Appeal from
County Court,
Cook County.

199 I.A. 522

STATEMENT OF THE CASE. On December 29, 1914, plaintiffs (appellees) commenced an action in assumpsit against defendant (appellant) in the County Court of Cook County to recover for certain coal sold and delivered. The declaration consists of the common counts. In plaintiffs' affidavit of claim, subscribed by R. C. Whitsett, it ~~is~~ was stated in substance that certain Illinois Mine Run coal (number of pounds specified) was sold and delivered to defendant on January 4th, 6th, 7th and 8th, 1910, and 52100 pounds of Indiana Mine Run coal on January 8, 1910; that the fair market price of the Illinois coal at the time and place of delivery was $1.15 per ton, and of the Indiana coal $2.55 per ton; and that "there is due to the plaintiffs from the defendant, after allowing to it all just credits, deductions and set-offs, $348.19 for said shipments of coal, and interest at 5% to date, amounting to $85.55, making a total amount due of $433.74." On January 14, 1915, the defendant filed a plea of the general issue and also a plea of set-off. In the latter plea it ~~is~~ was alleged that "plaintiffs were before and at the time of the commencement of this suit, and still are, indebted to it, the defendant, in the sum of $10,023.35 for damages sustained by it." It ~~is~~ was then alleged that on December 24, 1909, plaintiffs made a written proposal to defendant, which proposal was on the same day accepted in writing by defendant. Said proposal ~~is~~ was set out

in haec verba in the plea, which was to the effect that plaintiffs offered to furnish defendant "from December 28, 1909, to March 30, 1910," two specified grades of coal from a mine at Ward, Illinois, "50 tons per day" of one grade, and "100 tons per day" of the other grade, at certain named prices, "f.o.b. mines," and that mine weights were to govern settlements, which settlements were "to be made on or before the 10th day of each month for all shipments made during the preceding month." It was further alleged in said plea, in substance, that the claim mentioned in plaintiffs' declaration grew out of said proposal and acceptance; that on January 18, 1910, plaintiffs refused to further carry out said agreement and so notified defendant; that notwithstanding the defendant was at all times willing and able to perform its part of said agreement, plaintiffs would not and did not make any further deliveries of coal under said agreement and refused to deliver the remainder of the coal, to-wit, 13329 tons; and that by reason thereof defendant had sustained damages in said sum of $10,023.35, which sum exceeded the damages sustained by the plaintiffs by reason of the non-performance by the defendant of the several supposed promises in said declaration mentioned, and out of which sum defendant was ready and willing and hereby offered to set-off and allow to the plaintiff the full amount of plaintiffs' damages, if any. With said pleas there was also filed an affidavit of merits, subscribed by an agent of defendant, in which it was stated that "the nature of the defendant's defense was as in the last plea above stated and set forth."

On January 13, 1915, the defendant filed a verified petition praying that the venue of the suit be changed to the Municipal Court of Chicago. It was alleged in the petition that defendant "instituted suit" (it was not stated when) in said Municipal Court to recover damages of plaintiffs in said sum of

$10,023.35 by reason of the breach of said agreement and that said suit ~~is~~ was still pending; that the present suit in the County Court ~~is~~ was brought by plaintiffs to recover the "value of the unpaid portion of the coal delivered " under said agreement; that defendant had filed said plea of set-off; that the amount involved in the "controversy" exceeds $1,000, and that the County Court could not render judgment in favor of defendant for the amount claimed by it; and that, therefore, the present suit had been commenced in the wrong court. On January 30, 1915, a hearing was had on said petition to transfer said cause to said Municipal Court, and the same was denied and defendant excepted.

On February 3, 1915, plaintiffs filed a demurrer to said plea of set-off, stating as a cause of demurrer that defendant claimed a sum of money in excess of the jurisdiction of the court. On February 6, 1915, on the several motions of plaintiffs, after due notice to defendant and after hearing arguments of the respective counsel, the court struck from the files the defendant's said plea of set-off, also defendant's affidavit of merits, and also defendant's plea of general issue for want of the support of a <u>sufficient</u> affidavit of merits, to all of which actions of the court the defendant excepted. It did not appear that defendant offered to file any further or additional affidavit of merits. Thereupon the court entered judgment against the defendant for the sum of $433.74 and defendant excepted and prayed and perfected this appeal.

MR. PRESIDING JUSTICE CHILLEY DELIVERED THE OPINION OF THE COURT.

It is contended that the court erred in denying the petition of defendant to transfer the cause to the Municipal Court. We do not think so. The County Court is given concurrent jurisdiction with the Circuit Court in all that class of cases wherein justices of the peace now have or may hereafter have jurisdiction, where the amount claimed or the value of the property in controversy shall not exceed $1,000. (Hurd's Stat. chap. 37, sec. 95.) The amount claimed by the plaintiffs was $433.74. By an act of the legislature, approved June 18, 1891 (Hurd's Stat. chap. 146, sec. 36), it is provided that "wherever any suit or proceeding shall hereafter be commenced, in any court of record in this state, and it shall appear to the court where the same is pending that the same has been commenced in the wrong court or county, then upon motion of either or any of the parties to such suit or proceeding, the court shall change the venue of such suit or proceeding to the proper court or county," etc. It does not appear that plaintiffs' action was commenced in the wrong court or county. The defendant filed a set-off, or cross-action, against plaintiffs claiming a sum greatly in excess of the court's jurisdiction, as damages for the alleged breach of a contract. We do not think that the defendant by so doing could deprive plaintiffs of their right to have their claim against defendant adjudicated in the court chosen by them and which had jurisdiction of the action.

It is also contended that the court erred in striking defendant's plea of set-off from the files. As the plea showed on its face that the amount claimed by the defendant was beyond the court's jurisdiction we think that the action was proper. (Turgrinson v. Meyer, 158 Ill. App. 559; Swallow v. Ivey, 24 Ill. 178.) And we think that the court properly struck defendant's

affidavit of merits from the files. In that affidavit it is stated that the nature of defendant's defense to plaintiffs' claim is as stated in said plea of set-off. That plea did not set forth any defense to plaintiffs' claim but rather a cross-claim or action against plaintiffs of which the court did not have jurisdiction.

And we are of the opinion, inasmuch as it does not appear that defendant offered to file any further affidavit of merits, that the court was justified in striking defendant's plea of the general issue from the files and in entering judgment in favor of plaintiffs for the amount claimed to be due them in their affidavit of claim, viz, $348.19, for said shipments of coal. (Sec. 55 Practice Act; Eddison v. Fortune Bros. Drawing Co., 182 Ill. App. 270, 272; Kearney v. County of Cook, 187 Ill. App. 435.) But the court entered judgment against defendant, not only for the amount claimed for said shipments of coal but also for interest claimed by plaintiffs on said amount, in the total sum of $433.74. We think that the court erred in including any interest in the judgment. (Sec. 2, chap. 74, Hurd's Rev.Stat.; Flake v. Carson, 14 Ill. 555, 556; Coubrough v. Union Electrical R. Co., 266 Ill. 482, 491.) The judgment of the County Court will, therefore, be reversed and judgment will be entered here in favor of the plaintiffs against the defendant, Chicago Washed Coal Company, for the sum of $348.19.

JUDGMENT REVERSED AND JUDGMENT HERE.

28 - 21260

HENRY S. WHITCOMB, trading as
HENRY S. WHITCOMB & COMPANY,
Defendant in Error,

vs.

EDGAR F. SENNY and ROLAND T.
ROGERS, Co-partners as SENNY,
ROGERS & COMPANY,
Plaintiffs in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

199 I.A. 526

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

In this case there was a directed verdict for the plaintiff who sold to Wm. E. Spencer a certain number of ranges, stoves and refrigerators for installation in an apartment building to help erect which defendants had loaned Spencer money. Work on the same having stopped, defendants (primarily to secure their loan) entered into a written agreement with Spencer to complete the buildings "free from mechanics' liens and save William E. Spencer harmless from all claims for material and labor," and took over the title to the real estate in the name of a third party.

The main question was one of law as to the construction of said agreement, whether it could be deemed one made for the benefit of third parties who had furnished material and labor for the building. The court held that it was and we think correctly. It is not questioned that if the contract may be so construed suit could properly be brought in the name of a party for whose benefit the contract was made. But it is contended that plaintiff, being an agent for manufacturers, the suit should, if the contract was properly construed, have been brought in the name of the manufacturers of the goods sold. It was undisputed, however,

that the goods were billed by them to plaintiff and paid for by him; hence, he became Spencer's vendor and could sue on the contract in his own name.

Objection was made to conversations between the parties to the contract had prior to its execution, which we think were merged therein, and as to the fact of defendants' paying for other material that had gone into the construction of the building, which we do not think was necessary to an interpretation of the contract. But had such objections been sustained, still on the undisputed facts as to the sale and price of the goods to Spencer and their installation in the building, and on the legal construction given the contract the court properly directed the verdict as there was no material question of fact for the jury. We need not, therefore, consider the materiality of other evidence or the points raised as to an independent promise or stated account.

AFFIRMED.

351 -- 21336.

ERNEST WASMUTH, Appellee, vs. FRANK LLOYD WRIGHT, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

199 I.A. 527

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

In this case judgment was entered by default for plaintiff (appellee), after the court had stricken defendant's affidavit of merits from the files and he had failed to file another within the time allowed.

The only question argued and presented here is whether such affidavit showed a legal defense.

Plaintiff's original statement of claim rested on a promissory note dated Aug. 28, 1913, and an account. Defendant's original affidavit of merits set up a defense to part of the account, and admitted execution and delivery of the note, but claimed it was given pursuant to the terms of certain agreements entered into between the parties hereto in 1909 and 1911 respectively, which provided that the title to certain personal property should remain in defendant. It further alleged that plaintiff had failed to deliver said property to defendant, and that therefore the consideration for the notes had partly failed, and would fail entirely unless plaintiff delivered such property to defendant.

Thereupon plaintiff filed an amended statement of claim which in effect stated a cause of action on the note alone. But it unnecessarily set forth the consideration of the note. To that end it alleged that the parties had

entered into two settlement agreements whereby they had adjusted disputes that had arisen between them over the agreements of 1909 and 1911, alluded to in defendant's affidavit of merits, and that said note was one of several executed and delivered pursuant to the settlement agreements.

To the amended claim defendant filed another affidavit of merits, setting up in substance the same defense as in the original affidavit of merits, and stating that said settlement agreements adjusted only such matters as were then in dispute and that no dispute had then arisen as to the title to said personal property, and that "it was understood" that defendant's said property would be returned to him, and that defendant did not discover that such property had not been returned to him until after the execution of the settlement agreements, believing however that it had been. The affidavit then sets up grounds by way of excuse for his failure to make such discovery, and claims ~~[illegible]~~ a total failure of consideration for the notes, but "offers to pay the balance due on said note" upon the return of said property to him.

The court properly regarded the amended statement of claim as a suit upon the note only, and defendant's affidavit as setting up no legal defense thereto. Appellant admits the correctness of the court's ruling if the amended statement of claim be so construed. Though plaintiff unnecessarily set forth the settlement agreements therein, he manifestly did so to explain the consideration for the note. It could not reasonably be construed as stating any other cause of action. It contains no averments which justify appellant's contention that the cause of action was such as to entitle defendant to avail himself of a breach of the original contracts of 1911 and 1913.

Unfortunately it presents another instance where the pleading of evidentiary facts serves to obscure instead of to elucidate the issues.

Appellant's appeal for "substantial justice" entirely ignores that justice, as administered by the courts, is not something separate and apart from the legal or equitable principles on which it rests. Whether or not his claim to the personal property referred to is well founded, as set forth in his pleading it presents no defense to his liability on the note.

AFFIRMED.

85 - 21468

CARTERVILLE MINING COMPANY,
a corporation,
Plaintiff in Error,

vs.

HAROLD ELDRIDGE, doing business
under the name of ELDRIDGE COAL
COMPANY,
Defendant in Error.

ERROR TO
SUPERIOR COURT,
COOK COUNTY.

199 I.A. 534

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The plaintiff below, Carterville Mining Co. declared on the common counts. Defendant, Eldridge, doing business in the name Eldridge Coal Co., pleaded a set-off, claiming damages for an alleged breach of contract by plaintiff to furnish defendant coal in accordance with said contract.

The principal question at issue was whether defendant was entitled to a set-off, it not being disputed that subject thereto plaintiff was entitled to an unpaid balance of $940.23 for coal delivered under said contract. Defendant was allowed his set-off to the amount of $547.27, in excess of said balance, for which there was a verdict and judgment.

As said in Barber Brothers Co. v. Moffat Cycle Co., 151 Ill. 84, "Set-off is a counter claim, as to which the defendant is plaintiff, and must establish his right as upon a distinct action; and, therefore, if for a breach of contract, must show he is not himself in default as to the agreement * * * on which he bases his claim." (p. 99)

The pleas allege a breach of said contract, which bore date Oct. 12, 1905, and provides: (1) Plaintiff shall

load and ship to defendant, and defendant shall accept one car of a specific quality of coal per day, for delivery from date to April 1st, 1906, at $1.10 per ton, F. O. B. cars, Carterville, Ill.; (2) Payments to be made on the 15th of the month for all coal shipped the preceding month, coal to be shipped promptly except in cases of labor troubles, shortage of cars, or any causes beyond plaintiff's control.

The testimony discloses that neither party repudiated the contract and both were in default almost during the entire life thereof. Plaintiff in no month furnished the quantity of coal called for, and defendant at no time paid for the coal it received when the payment was due. In making payments defendant was in default 24 days for December deliveries and 18 to 27 days for January deliveries, and never paid for either the February or March deliveries, the contract price for which was $376.48 and $563.75, respectively, aggregating $940.23, the amount plaintiff sued for.

The theory of the right to recover under the plea of set-off was, so far as there was an attempt to sustain any count of said plea, that defendant had sustained loss and damage "by reason of the great advance in the price of coal over and above the price agreed upon". Regardless of whether there was adequate proof of loss or damage thereby, it was incumbent upon defendant to show performance of its part of the contract or what would excuse performance. He did neither. He was clearly in default as above stated in his failure to make payments as provided for in the contract, and the case comes within the general rule stated in the Harber case, supra, and still earlier in Bradley et al. v. King, 44 Ill. 339, to the effect "that where a vendee has accepted goods delivered under an express contract, but not at the time or in the quantity required by it, with knowledge of the default of the

vendor in those respects, and has himself failed, without legal excuse, to pay for them according to it, he can not maintain an action on the contract for such default of the vendor." (Southern Redistilling & Bev. Co. v. Thurston & Co., 172 Ill. App. 55.)

There is no proof in this record, as there was in the case last cited, that brings the instant case within the exception to that general rule, where the vendee claiming damages for the vendor's default makes a distinct offer to set-off damages against the purchase price at the time of delivery of the goods accepted and retained, which it is incumbent on the vendee to do. (Bradley case, supra, p. 341; Harber Bros. case, supra, p. 97.) While defendant requested further shipments his correspondence during the life of the contract recognizes his obligation and purpose to pay the balance due for deliveries made. In his last letter before the contract expired, under date of March 13th, he promised to pay the "balance due on February shipments", and gave no intimation of any claim for damages until after the expiration of the contract when called on to pay the balance of the account. Under the authorities cited it is clear that defendant was in no position to set-off or recoup damages on the basis of his plea and the proof offered in support thereof. It was error, therefore, for the court to refuse to instruct the jury, as requested by plaintiff, to find the issues on the plea of set-off in favor of the plaintiff. Having reached this conclusion, we need not consider other points argued, for the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

163 - 21555

BENJAMIN DEVRIES,
Defendant in Error,

vs.

ELABORATED READY ROOFING COMPANY, (a corporation),
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

199 I.A. 536

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff (defendant in error) recovered judgment for $65 for commissions on finding of the court. We think it contrary to the law and weight of the evidence.

Defendant was engaged in making, selling and laying roofing. Under a contract made with its manager, plaintiff solicited orders directly from consumers. His contract required him to make an estimate or measurement of the number of "squares" of material (each containing 100 square feet) each job would require. He was directed how to make the measurements and was allowed an extra square on each job for any discrepancy. His compensation was to be 15 or 20 per cent of the selling price, according to the quality of material ordered. After estimating the cost of the job according to the amount and quality of material it would take, and securing the order at a gross price he would send in the order and from the price therein named defendant determined the amount of material to supply. Owing to inaccurate measurements on which the gross price of the job was based, it was often found necessary to supply more than an additional square to complete the job, thus necessitating loss on the contract. These shortages in

Plaintiff (defendant in error) recovered judgment for $[illegible] for commissions on failure of the court. [illegible] it contrary to the law and weight of the evidence.

Defendant was engaged in making, selling and [illegible] roofing. There a contract was [illegible] plaintiff solicited orders directly from consumers. The contract required him to make no claims or representations of the number of "squares" of material (each containing 100 square feet) such job would require. He was allowed [illegible] how to make the measurements and was allowed an extra [illegible] on each job for his discrepancy. His commission was to be 15 or 20 per cent of the selling price, according to the quality of material ordered. After calculating the cost of the job according to the amount and quality of material it would take, and adding the usual 15 or 20 per cent, the price he would send in the order and from the price thereon [illegible] determined the amount of material to supply. Owing to inaccurate measurements on which the price price of the job was based, it was often found necessary to supply more than an additional square to complete the job, thus necessitating loss on the contract. These shortages in

measurements were discussed when ascertained, and deductions therefor were made from plaintiff's commissions, and shown on the monthly statement of accounts submitted to plaintiff according to which he was paid. While he objected thereto, "he took the money and went right on working", as testified to by defendant's manager. Plaintiff himself testified that he was told he would have to stand the "cut" and that the matter was final. After he left defendant's employ he brought this suit for practically the amount of such deductions. But under these circumstances, even though he protested against the deductions, we think his acceptance of the balances according to the statements constituted an accord and satisfaction, and precluded any right of recovery. (Canton Union Coal Co. v. Parlin & Ovendorff Co., 215 Ill. 244; Ostrander v. Scott, 161 id. 399.)

REVERSED.

190 - 21583

ROSE LANGE,
Defendant in Error,

vs.

SADIE STACK and ANTON J. CERMAK,
as Bailiff of The Municipal Court
of Chicago,
Plaintiffs in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

199 I.A. 538

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was a case of the fourth class for the trial of the right of property, and on trial before the court without a jury the finding was for plaintiff, who was the only witness and testified to her ownership of the several articles of property. The abstract discloses no objections taken to the testimony, no propositions submitted to be held as law, and no motion except at the close of the evidence to dismiss the case for want of a prima facie showing. Hence all there is for review is the court's action in overruling that motion. The law points argued are not saved for review. (Flodin v. Lutes Co., 191 Ill. App. 195.)

Practically every one of the numerous articles of property in question was shown to have been either a gift to plaintiff or purchased by plaintiff with money given to her by her relatives, and even as to the very few articles to which her husband could in any way lay claim on strength of the technical points urged, there was at least prima facie proof of her ownership. The points made are more technical than substantial and we deem them insufficient to warrant disturbing the judgment.

AFFIRMED.

717

609 - 20947

JOHN F. DEVINE, Administrator of the Estate of LILLIAN A. SULLIVAN, Deceased, Appellee,	APPEAL FROM
vs.	SUPERIOR COURT, COOK COUNTY.
L. FISH FURNITURE COMPANY, a corporation, Appellant.	

199 I.A. 539

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

John F. Devine, administrator of the estate of Lillian A. Sullivan, deceased, recovered a judgment in the Superior Court of Cook County against the L. Fish Furniture Co., for damages by the death of said Lillian A. Sullivan, an employe of defendant (appellant), charged to have been caused by the failure of defendant to comply with the provisions of section 14 of the Factory Act, entitled "An Act to provide for the health, safety and comfort of employes in factories, mercantile establishments, mills and workshops in this State, and to provide for the enforcement thereof." (Laws of 1909, p. 202.) From such judgment defendant appeals.

The plaintiff's (appellee's) intestate was employed on the sixth floor of defendant's mercantile establishment and was killed by a fire that occurred in said premises on March 25, 1910. Two cases arising from such occurrence were decided by the Appellate Court in Hunt v. L. Fish Furniture Co., 187 Ill. App. 326 and Devine v. L. Fish Furniture Co., 189 Ill. App. 136, respectively, and two other of such cases were decided by the Supreme Court in Greene v. Fish Furniture Co., 272 Ill. 148 and Lichtenstein v. Fish Furniture Co., 272 Ill.

Hunt v. L. Fish Furniture Co., 187 Ill. App. 320

191. The statement of facts in the Hunt case is substantially a correct statement of the facts in the instant case, and need not be restated here.

Counsel for defendant contend that section 14 of the Factory Act, under which this action was brought, is in violation of the Illinois and Federal constitution as to "due process of law", and also in violation of the provision of the state constitution which prohibits the passing of special laws. Such question cannot be considered by this court. Corn v. Greenberg, 181 Ill. App. 669, 672. Said section, however, has been held valid and free from constitutional objection in the case of Greene v. L. Fish Furniture Co., supra.

Defendant's counsel also contend that the court erroneously permitted plaintiff's counsel to ask improper questions of a juror on his voir dire. The juror when asked if he knew anyone on either side of the case replied that he was well acquainted with Mr. Noxon, one of defendant's counsel, who represented the Quality Car Company, with which company such juror was associated. The following then occurred:

Q. You carry insurance, don't you?
A. Yes, sir.
Q. And he represents you?
A. Yes, sir.

Thereupon defendant's counsel duly objected to, and moved that a juror be withdrawn because of the foregoing question. Upon the evident assumption that counsel's interrogatories implied liability insurance, the court ruled that it was improper for plaintiff's counsel to refer to "liability insurance" in the presence of the jury, sustained defendant's objection to the question complained of, but overruled defendant's motion to withdraw a juror. Upon the completion

of the examination by plaintiff's counsel of the jury upon their voir dire, he tendered such jury to counsel for defendant, who, thereupon, made a motion to discharge the entire panel and impanel a new jury because of the foregoing questions asked by plaintiff's counsel, which motion was overruled by the court. Such examination, if made for the purpose of enabling counsel to exercise their right of peremptory challenge, was held to be proper in Iroquois Furnace Co. v. McCrea, 191 Ill. 340. The verdict in the instant case, $5000, is not large, the objection to the examination was promptly sustained by the trial court, and we do not think its effect was prejudicial to defendant. Aetitus v. Spring Valley Coal Co., 246 Ill. 32, 36.

Counsel further assign as error the giving of plaintiff's instruction #2, which instruction, so far as material, reads as follows: "If the jury believe from the preponderance of the evidence * * * that said mercantile establishment was not provided with sufficient and reasonable means of escape in case of fire * * *". It is contended that in using the words "sufficient and reasonable" (which words are contained in section 14 of the Factory Act), such instruction did not give a fixed definition to the word "sufficient", and in effect makes defendant an insurer. A like objection to a similar instruction was decided adversely to defendant's contention in Greene v. L. Fish Furniture Co., supra.

Defendant's counsel contend that the court erred in refusing instruction #1 tendered by defendant, which was to the effect that before the jury could find the defendant guilty of any violation of the statute upon which plaintiff's declaration was based, plaintiff was bound to produce such evidence as would satisfy the jury beyond a reasonable doubt of the commission of such violation. In this connection it is to

be noted that the court at defendant's request instructed the jury as follows: "If the evidence in this case preponderates in favor of the defendant, L. Fish Furniture Co., or if the evidence fails to preponderate in favor of the plaintiff * * * the jury should find the defendant not guilty". "A party cannot complain of an instruction given on behalf of his adversary like one given at his own request." Springer v. City of Chicago, 155 Ill. 552, 560; Woods v. Bailey, 211 Ill. 495, 498.

Defendant's counsel also assign as error, the giving of defendant's eighth instruction as modified by the court. This instruction, with the modified portion italicized, reads as follows:

> "If you find from the evidence that the death of plaintiff's intestate was the result of an accident merely and was not caused by the negligence of the defendant as charged in the first or eighth count of the plaintiff's declaration, then your verdict must be not guilty."

At the close of plaintiff's case, all of the other counts of his declaration had been eliminated from the case, and, thereupon, the jury were so informed by the court and defendant's counsel. Such instruction as modified, could not have been misleading and its effect was to exclude from the consideration of the jury the counts not mentioned therein, and the giving of same was not error. 38 Cyc. 1636; Smith v. McDaniel, 5 Ind. App. 581, 584.

It is also urged that the court erred in refusing to give defendant's instruction #14 which was as follows:

> "You are not at liberty to find the defendant guilty of any negligence or wrong or violation of law or ordinance in constructing the partition on the sixth floor of the building in question."

The negligence referred to in said refused instruction was not charged in either of said counts of plaintiff's declaration

"Refusal to give a specific instruction to the effect that there could be no recovery by reason of the existence of a certain condition which was not charged as a ground of negligence in the declaration is not reversible error, where other instructions are given limiting the plaintiff's right of recovery to the negligence charged in the declaration." Devine v. Chicago City. Ry. Co., 262 Ill. 484.

The remaining instructions tendered by defendant and refused by the court were fully covered by other instructions given.

It is further contended that the court erred in permitting counsel for plaintiff to ask one of plaintiff's witnesses whether directions had been given in using the windows as a means of escape. The question did not specify from whom the directions might have come, and it is urged that there was impliedly contained in such question a suggestion that a duty rested upon defendant to give instructions regarding the windows. Such question was bad in form and defendant's objection thereto should have been sustained. Defendant, however, offered evidence tending to show that windows were on the south and west side of the building; that there were five or six windows within the space used as an office; that such windows were partly open all of the time; that the windows in connection with the fire escapes could be used as a means of egress in the event of fire, and that there was a fire escape sign above one of these windows. In view of this evidence, we are unable to see how defendant could have been prejudiced by the ruling of the court complained of.

It is further assigned as error that the court refused to permit one of defendant's witnesses to testify as to the condition of the aisles upon the sixth floor on the evening

of the day preceding the fire. The Supreme Court in the Lichtenstein case, supra, held that, "If the fire escape was a bad one the defendant would be liable anyhow, and whether access to it was obstructed or not would be immaterial."

It is further urged that there was a fatal variance between plaintiff's declaration and the evidence, and a failure to prove either of the two counts thereof, because, it is alleged, there was no evidence tending to show that defendant had not complied with the statute in question. Defendant made a similar assignment of error in the case of Devine v. L. Fish Furniture Co., supra, wherein the evidence did not materially differ from that in the instant case, and the court there said: "The defendant contends that there was a fatal variance between the proof and the declaration, and that the court should have stricken out certain evidence offered by the plaintiff because of the said variance. We find no merit in this contention."

Upon an entire review of the record in this case, we are of the opinion as stated by the Supreme Court in the Lichtenstein case, supra, that the jury could not have reached any other conclusion under the facts and the law. The judgment of the trial court will be affirmed.

JUDGMENT AFFIRMED.

674 - 21012.

CARL BUSHNELL, et al., Appellees,	)	APPEAL FROM
vs.	)	COUNTY COURT, COOK COUNTY.
HORACE L. BRAND, Appellant.	)	

199 I.A. 542

STATEMENT OF THE CASE. In this case the plaintiffs (appellees) brought suit against Horace L. Brand resulting in a verdict and judgment for $731.19 against defendant (appellant). On February 14, 1912, there was drawn up a written memorandum of agreement between the parties whereby the plaintiffs were to undertake and agree to furnish all material, labor, etc., for the remodeling of the Illinois Staats-Zeitung building, 24-28 South Fifth Ave., Chicago, and the defendant was to agree to pay them for such work the sum of $20,713.95. This document was not signed, but plaintiffs at once started wrecking in the basement of said building. On or about February 21, 1912, the parties hereto entered into a supplementary agreement, upon which this action is based, the provisions of which agreement so far as material to the issues in this case, are as follows:

"It is further agreed that the party of the first part (plaintiffs) contracts and agrees to furnish all the material, labor, tools, etc., and to complete and finish for the said party of the second part (defendant), all the general work required for the remodeling of the Illinois Staats Zeitung Building - #24-28 South Fifth Avenue, in said City of Chicago, * * * according to the foregoing specifications, and to the full and complete satisfaction of Hill & Woltersdorf, Architects and Superintendents, as aforesaid, (said second party) doth hereby agree to pay to the said first party as the work progresses, and as the same shall be certified to by the said superintendents, from time to time, a sum equal to the actual cost of material furnished by party of the first part and attested to by the architects plus the

actual cost of labor expended by the party of the first part, which sum shall be attested to by said architect, plus the arbitrary sum of 15% upon the total of the two aforesaid amounts, namely, the cost of material plus the cost of labor therein."

"It is further agreed * * * that one-half of the aforesaid 15% * * * shall be reserved * * * and held by the second party until the full completion of the work under this contract as security for the proper execution of the work stipulated by this supplementary agreement by the party of the first part * * * ."

In the process of remodeling said building plaintiffs sub-let contracts for certain of the work in connection with said building, aggregating $9749.17. Between February 21, 1912 and May 1, 1912, defendant's architects, Hills and Woltersdorf, issued to plaintiffs three certificates to the effect that plaintiffs were entitled to the sum stated therein for general work and material furnished under said supplementary agreement, each of which certificates were paid by defendant. The amounts thus paid included the cost of the sub-contracts plus 15%, less 7-1/2% to be retained by defendant under said agreement until the completion of the work in question. About May 1, 1912, a dispute arose between the parties as to commission on sub-contracts, resulting, on June 15, 1912, in an agreement that whether plaintiffs would receive 15% or 7-1/2% upon all sub-contracts let by them should be determined by arbitration, and thereupon plaintiffs proceeded with and completed the work. Altogether, defendant's architects certified to him that plaintiffs had furnished under said agreement, material and labor amounting to $35,130.98, and that "7-1/2% on sub-contracts in the sum of $9749.17, amounting to $731.19, to be settled by arbitration". Subsequently, upon advice of counsel, defendant refused to appoint an arbitrator upon the ground that there was nothing to arbitrate.

It is contended by defendant that under said

additional cost of labor incurred by the party of the first part, which sum shall be attested to by said architects, plus the arbitrary sum of 15% upon the total of the sum [illegible] the cost of labor therein."

"It is further agreed * * * that one-half of the aforesaid 15% * * * shall be reserved * * * and held by the second party until the full completion of the work under this contract as security for the proper execution of the work stipulated by this supplementary agreement by the party of the first part * * * ."

In the process of remodeling said building plaintiffs sub-let contracts for certain of the work in connection with said building, aggregating $9749.17. Between February 21, 1912 and May 1, 1912, defendant's architects, Hills and Wetterhorst, issued to plaintiffs three certificates to the effect that plaintiffs were entitled to the sum stated therein for general work and material furnished under said supplementary agreement, each of which certificates were paid by defendant. The amounts thus paid included the cost of the sub-contracts plus 15%, less 7-1/2% to be retained by defendant under said agreement until the completion of the work in question. About May 1, 1912, a dispute arose between the parties as to commission on sub-contracts, resulting, on June 14, 1912, in an agreement that whether plaintiffs would receive 15% or 7-1/2% upon all sub-contracts let by them should be determined by arbitration, and thereupon plaintiffs proceeded with and completed the work. Altogether, defendant's architects certified to him that plaintiffs had furnished under said agreement, material and labor amounting to $16,139.78, and that "7-1/2% on sub-contracts in the sum of $7749.17, amounting to $581.19, to be settled by arbitration". Subsequently, upon advice of counsel, defendant refused to appoint an arbitrator from the street that plaintiffs were willing to arbitrate.

It is contended by defendant that under said

agreement plaintiffs were only entitled to receive from defendant the arbitrary sum of 15% on the actual cost of material and labor furnished by plaintiffs, and that as the material and labor furnished by the sub-contractors included a profit to such sub-contractors, such material and labor did not come within the terms of such agreement. Defendant also contends that the court erred in admitting evidence of custom in the building trade in Chicago (which evidence tended to show that general contractors are permitted to sub-let contracts), and that the court further erred in giving improper instructions in behalf of plaintiffs and in refusing to give proper instructions offered by defendant. /-

MR. JUSTICE McCONTY DELIVERED THE OPINION OF THE COURT.

The supplementary agreement upon which this action is based provides for the payment by defendant to plaintiffs of a sum equal to the actual cost of (1) material furnished, and (2) labor expended by plaintiffs, plus the arbitrary sum of 15% upon the total thereof. It is contended that the court erred in admitting evidence over defendant's objection, in regard to a general custom in the building trade in Chicago, to the effect that when a contractor agrees to furnish material and labor, and to receive as his commission 15% of the cost thereof, he is permitted to sub-contract portions of such work and to receive such commission on such sub-contracts. There were several sub-contracts let by plaintiffs on the work in question. There is a conflict of evidence as to whether defendant consented to the letting of any of such contracts. There is no evidence as to the actual cost of labor and material included in such sub-contracts, it being admitted by plaintiffs that the sub-contract price in each instance

represented a profit to such sub-contractor, and, therefore, was in excess of the actual cost of the material and labor contained therein. Upon the refusal of defendant to arbitrate, plaintiffs brought this suit to recover $731.19, the remaining 7-1/2% of $9749.17, amount of said sub-contracts. The agreement in question provided for a specific sum to be paid as compensation to plaintiffs by defendant. Such compensation was to be a sum equal to 15% of the actual cost of material and labor furnished by plaintiffs to defendant. The words "actual cost" have a fixed and definite meaning, and in the instant case should be construed to include only the actual price paid for labor and material, and not the sub-contractor's profits, and on the amount of such actual cost of labor and material furnished, the 15% should be computed. What was the actual cost does not appear from the evidence. This agreement is free from ambiguity, and, therefore, evidence of any custom that would vary or modify its express terms was inadmissible. Turner v. Osgood Art Colortype Co., 223 Ill. 629. The trial court erred in admitting evidence as to custom in the building trade in Chicago and in instructing the jury in relation thereto. Because of such errors the judgment of the County Court will be reversed and the cause remanded.

REVERSED AND REMANDED.

346 - 21331

MENDEL SACHS,
Appellant,

vs.

FRIEDMAN BROS. &. LIPSKY CO., (a corp.),
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

199 I.A. 550

STATEMENT OF THE CASE. This was a suit brought by Mendel Sachs against Friedman Bros. & Lipsky Co., a corporation, to recover $1218.84 for merchandise sold and delivered. An attachment in aid issued in connection with said suit January 14, 1915, on which date defendant disposed by public auction of most of its property. Michael Tauber and Michael Levy, doing business as Michael Tauber & Co., conducted said auction sale, were summoned as garnishees and filed their answer to plaintiff's interrogatories, admitting an existing indebtedness to defendant in excess of $1218.84 at the time of service of said writ. Defendant filed an affidavit of merits denying that plaintiff at any time sold and delivered to defendant the merchandise set forth in plaintiff's statement of claim and traversed plaintiff's affidavit of attachment, which affidavit alleged that defendant, within two years last past, fraudulently (a) conveyed or assigned its effects; (b) concealed or disposed of its property; (c) that it was about to fraudulently conceal or dispose of its property, so as to hinder and delay its creditors. Trial by jury having been waived, the cause was submitted to the court who found the attachment issues and the issues on the merits in favor of defendant, dismissing the attachment writ and entering judgment against plaintiff for costs. From such findings and judgment

plaintiff appeals.

Plaintiff was a retail and wholesale dealer in ladies' wear, including serge cloth, satins, coats, etc., in Chicago. Defendant was engaged in manufacturing, exclusively, men's clothing, at 241 W. Van Buren St., Chicago. The principal question of fact presented for our determination, is - Was the merchandise in question sold and delivered to defendant? Alexander Cohen, then (but not at the time of the trial) in plaintiff's employ as salesman, testified that he called at defendant's place of business during July, 1914, where he displayed to H. L. Friedman, vice president of defendant, samples of serge cloth. Plaintiff testified that on the evening of the same day, Friedman called on plaintiff stating that he represented defendant and presented to plaintiff the following card:

"M. Lieberman, Pres. A. Friedman, Treas.
H. L. Friedman, V. Pres. A. Lipsky, Sec. & Gen. Mgr.

Friedman Bros. & Lipsky, Inc.
Manufacturers of the Celebrated Brand
F. B. & L. clothing.

241-245 W. Van Buren St. Phone Wabash 5130
S. E. cor. Franklin. Chicago."

Plaintiff's evidence tends to show that Friedman then purchased from plaintiff serge cloth saying, - "You can ship it to us", and that the "house" will make payment on delivery. Plaintiff's salesman continued to call almost daily at defendant's place of business and testified that he made more than thirty sales to defendant through its various officers during the period commencing about July 18, 1914, and ending October 31, 1914, inclusive. Plaintiff shipped several lots of merchandise to defendant's place of business, for all of which merchandise plaintiff received prompt payment, except for four certain shipments sent there during October, 1914. The invoices for some of the merchandise thus sold were

plaintiff appeals.

Plaintiff was a retail and wholesale dealer in ladies' wear, including serge cloth, cloaks, suits, etc., in Chicago. Defendant was engaged in manufacturing, exclusively men's clothing, at 321 S. Van Buren St., Chicago. The principal question of fact presented for our determination, is - Was the merchandise in question sold and delivered to defendant? Alexander Kaman, (not then but at the time of the trial) in plaintiff's employ as salesman, testified that he called at defendant's place of business during July, 1916, where he displayed to M. L. Friedman, vice-president of defendant, samples of serge cloth. Plaintiff testified that on the evening of the same day, Friedman called on plaintiff stating that he represented defendant and presented to plaintiff the following card:

"M. Friedman, Pres.   A. Friedman, Treas.
M. L. Friedman, V. Pres.   A. Lipsky, Sec. & Gen. Mgr.

Friedman Bros. & Lipsky, Inc.
Manufacturers of the Celebrated Brand
F. B. & L. Clothing.

321-323 S. Van Buren St.,   Phone Harrison 4130
S. W. cor. Franklin,   Chicago."

Plaintiff's evidence tends to show that Friedman then purchased from plaintiff serge cloth saying, - "You can ship it to me", and that the "house" will make payment on delivery. Plaintiff's salesman continued to call almost daily at defendant's place of business and testified that he sold more than thirty sales to defendant through its various officers during the period commencing about July 17, 1916, and ending October 21, 1916, inclusive. Plaintiff shipped several lots of merchandise to defendant's place of business, for all of which merchandise plaintiff received prompt payment, except the four certain shipments made there during October, 1916.

billed to defendant, but the greater number of invoices therefor were billed to H. L. Friedman. Three of the latter invoices were introduced in evidence, together with thirteen checks payable to plaintiff and signed "H. L. Friedman".

Friedman received from defendant a salary of $25.00 a week and also claimed to be a jobber in ladies' dress goods for himself, and testified that he occupied for such purpose a portion of defendant's stock room. Friedman further testified that he kept no record as to goods bought or sold by him, for his own account, and no record as to when he started in business for himself, but thought it was about two years before the trial. It is admitted that the only business sign appearing on the building occupied by defendant was that of Friedman Bros. & Lipsky Co. (defendant), and that all merchandise sent there by plaintiff was received by defendant's shipping clerk. Plaintiff's salesman further testified that frequently Lipsky and H. L. Friedman together checked up plaintiff's bills and on many occasions Lipsky wrote checks, which H. L. Friedman signed, payable to plaintiff's order, and given to him in payment of such bills. For the four last of said shipments of merchandise, checks were received by plaintiff in the aggregate sum of $1213, signed by H. L. Friedman and payable to plaintiff. Payment on said checks having been stopped, plaintiff's salesman called at defendant's place of business and asked H. L. Friedman for an explanation, and testified that the latter said in reply "The check will be good in a day or two: it will be all right", and that A. Friedman, a brother of H. L. Friedman who was present, said "Why don't you tell him that we won't pay any of the checks, we know where the goods came from * * * we consulted our lawyer * * * and he told us not to pay it". H. L. Friedman testified that he told plaintiff's salesman payment on said checks had been stopped because the goods sold were not as

billed to defendant, but the greater number of invoices therefor were billed to R. L. Friedman. Proof of the [illegible] were introduced in evidence, together with [illegible] made to plaintiff and signed "R. L. Friedman".

Testimony adduced from [illegible] showed that, in a week and also claimed to be a jobber in hosiery, [illegible] for himself, and testified that he received [illegible] a portion of defendant's goods from [illegible]. Friedman testified that he kept no record as to goods bought or sold by him, for his own account, and no record as to [illegible] hosiery for himself, but [illegible] it was about the same [illegible] the trial. It is admitted that the only [illegible] appearing on the building occupied by defendant was that of Friedman Bros. & Kirsky Co. (defendant), and that all [illegible] charging sums due by plaintiff were addressed to defendant's supply clerk. Plaintiff's witnesses testified that frequently Kirsky and R. L. Friedman [illegible] plaintiff's office and on many occasions Kirsky [illegible], which R. L. Friedman signed, payable to plaintiff's order, and given to him in payment of such [illegible]. The [illegible] said shipments of merchandise, [illegible] in the aggregate sum of $1800, [illegible] R. L. Friedman payable to plaintiff. Payment on [illegible] stopped, plaintiff's salesman called [illegible] business and asked R. L. Friedman for [illegible], and testified in [illegible] good in a day or two: it will be all right", and that R. L. Friedman, a brother of R. L. Friedman [illegible], said "My dear, you tell him that we won't pay any of the checks, we know where the goods came from * * * we [illegible] lawyer * * * and he said we not to pay it". R. L. Friedman testified that he told plaintiff's salesman [illegible]

represented by plaintiff to Friedman, that "it was a crooked business * * * that he got me to buy goods that was a failure". During the progress of the trial, defendant's counsel made a statement, unsupported by any evidence, that the merchandise in question was taken from a certain bankrupt, to defraud the latter's creditors. Lipsky, defendant's secretary and general manager, testified that he did all of the buying for defendant, and denied that defendant had at any time purchased merchandise from plaintiff, and that all purchases made by defendant during such period were from the American Woolen Co. H. L. Friedman denied that any of the cloth shipped by plaintiff to defendant's place of business was ever used or cut up by defendant. During such period Friedman had made from serge cloth furnished by plaintiff, a sample lady's suit, but could not remember, at the time of the trial, who made such suit for him. Friedman and Lipsky both testified that no payments were made by defendant for merchandise delivered by plaintiff to defendant's place of business.

Plaintiff, in due course of business, received two checks, one for $217.16 dated September 23, 1914, the other for $430.39 dated October 8, 1914, signed "H. L. Friedman", corresponding in amounts and dates with invoices for merchandise sold by plaintiff and delivered to defendant's place of business. Lipsky who testified that he signed all checks issued by defendant company, denied that he had given to Friedman on the above dates, or at any time, checks for either of said sums, but later, when confronted in court by a clerk of the bank upon which said checks were drawn, admitted that on said dates he delivered to H. L. Friedman, defendant's checks for said amounts, as a loan, however, and not as payment to plaintiff, and that such loans or advances

to H. L. Friedman were entered upon the stubs of defendant's check book. Upon being directed by the court to produce such stub book, Lipsky promised but failed to do so and subsequently claimed that said stub book was lost and that similar entries would appear upon the accounts receivable book of defendant, and promised but failed to produce such book, stating that it was left at 241 W. Van Buren St., which place it appears defendant occupied until it ceased doing business, and that defendant was no longer in possession of said premises. It appears in evidence that the firm of Friedman Bros., consisting of H. L. Friedman and A. Friedman have continuously occupied said premises and conducted business therein since defendant ceased doing business, and that at such time defendant's books were left in the custody of Lieberman, its president. H. L. Friedman also testified that he had not received either of said defendant's checks in question, and that he never received from defendant a check to cover a similar amount paid by him to plaintiff . Before the close of the trial, however, Friedman admitted receipt from defendant of the above and other similar checks for which he claimed he exchanged his checks. In corroboration he produced sixteen checks signed by him, payable to defendant's order, only two of which (one for $80 and another for $80, respectively), were given at a date subsequent to July 18, 1914, the date of the first shipment in question by plaintiff. H. L. Friedman further testified, either, that he or his brother, under the name of Van Buren, or a man by that name, purchased for $1500, a portion of the property of defendant at its auction sale on the day the attachment writ issued.

73

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

(It is contended by plaintiff that the findings and judgment of the Municipal Court are against the manifest weight of the evidence.) [It is admitted that all of the merchandise which plaintiff claims that he sold and delivered to defendant was delivered to defendant's place of business and received there by its shipping clerk.] (While defendant and its vice president, H. L. Friedman, contend that such merchandise was purchased by the latter for his personal account (of which plaintiff, it is claimed, had knowledge), it is further admitted that on at least two occasions Friedman received from defendant checks corresponding in date and amount to invoices or merchandise shipped by plaintiff to defendant's place of business, and that on such dates checks for like amounts were given to plaintiff by the said Friedman.) [It ~~also~~ appeared in evidence that upon each of these occasions defendant borrowed money from the bank upon which its checks were drawn,] although it was claimed by defendant and Friedman that such checks represented loans from defendant to the latter. The failure of defendant to produce after a subpoena duces tecum had been issued, either its stub book or accounts receivable book, which its general manager swore contained entries evidencing such loans from defendant to Friedman, although these books were said to be at the premises then occupied by the latter and his brother, together with irreconcilable contradictions in both his and H. L. Friedman's testimony, strongly tends to discredit the testimony of these witnesses on matters material to the issues. A Friedman who is alleged to have said to plaintiff's salesman that defendant was advised by its attorney that defendant did not have to pay plaintiff for the merchandise

in question, did not testify at the trial, and such statement has not been denied. It is admitted by H. L. Friedman that plaintiff did not receive payment for any part of the merchandise delivered to defendant's place of business during October, 1914.

There is a preponderance of evidence to the effect that the merchandise in question was sold and delivered to defendant, and that the relation of debtor and creditor existed between plaintiff and defendant on and before January 14, 1915, at which time, it is admitted, defendant, without notice to plaintiff, sold at public auction nearly all of its property in contravention of the Bulk Sales Act. (Johnson Co. v. Belcosky, 263 Ill. 363.) We are of opinion the court erred in quashing the attachment writ and in finding the issues on the merits in favor of defendant, and that its judgment should be reversed and the cause remanded.

REVERSED AND REMANDED.

in question, did not identify at the trial, and even respondent has not been denied. It is contended by K. L. Stevens that plaintiff did not receive payment for the new part of the merchandise delivered to defendants place of business during October, 1914.

There is a preponderance of evidence to the effect that the merchandise in question was sold and delivered to defendant, and that the relation of debtor and creditor existed between plaintiff and defendant on the January 14, 1915, at which time, it is admitted, defendant gave notice to plaintiff, both at public auction and by mail, of its property in contravention of the bulk sales act. (Adams vs. v. Delaney, 200 Ill. 308.) Because of omission to err in granting the attachment writ and in finding the issues on the merits in favor of defendant, the judgments should be reversed and the cause remanded.

Reversed and remanded.

155 - 22103

1720

NATIONAL BANK OF THE REPUBLIC OF CHICAGO,
Defendant in Error,

vs.

ARTHUR K. HITOMI et al.,
Plaintiffs in Error

ERROR TO MUNICIPAL COURT OF CHICAGO.

199 I.A. 552

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Heretofore, on May 12, 1916, an order was entered in this cause striking the bill of exceptions from the record. Defendant in error now moves the court to affirm the judgment on the ground that the assignments of error and the brief and argument of plaintiff in error touch only points appearing by the bill of exceptions, upon investigation we find this to be the fact. No errors are assigned or argued arising upon the statutory record, which is all that is now before this court.

This being true, there is nothing left for this court to do but affirm the judgment, which is accordingly done.

AFFIRMED.

182 - 22134

HARRY J. GRIMM, Executor of the Estate of Henry E. Grimm, deceased, Defendant in Error, vs. CLARK DELIVERY CAR COMPANY, Plaintiff in Error.	ERROR TO SUPERIOR COURT OF COOK COUNTY.

199 I.A. 553

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Henry E. Grimm while crossing Clark street at its intersection with Adams street in Chicago was struck by an automobile truck and received injuries resulting in his death. His executor brought suit against Morrison, Plummer & Company, whose name appeared on the truck, and the defendant Clark Delivery Car Company, which owned the truck. Upon the trial the court instructed the jury to find Morrison, Plummer & Company not guilty. The issue as to the Clark Delivery Car Company being left to the jury, it found the defendant guilty and assessed the damages at $10,000. Judgment was entered on the verdict, which defendant seeks to have reversed.

We have concluded that the judgment must be reversed on the ground that the evidence fails to prove that defendant was guilty of the negligence alleged, but does prove that the accident occurred through the failure of the deceased to exercise due care for his own safety.

Deceased had an office in the Harris Trust Company building on Monroe street in Chicago, was thirty-five years of age, physically active, with good eyesight

and hearing.

Of the five eyewitnesses testifying four testified substantially that the accident happened in this way: Under the downtown traffic regulations in Chicago the police officer directing the movement of traffic at street intersections blows one whistle as a signal for the traffic to move from north to south and vice versa. At this time the east and west traffic stands until the officer gives two whistles, when it moves, while the north and south traffic in turn stands still. Clark street runs north and south, Adams east and west. Deceased was at the southwest corner of the two streets, starting to go east across Clark on a line about four feet north of the south crosswalk across Clark. It was proved by the clear preponderance of the evidence that as deceased started easterly to cross Clark, the traffic, pursuant to the officer's single whistle, was going north and south - that is, deceased was going against the course of the traffic. The last vehicle in the procession going south, running about equi -distant between the westerly street car track on Clark and the west curb, was the auto-truck of the defendant. It was going about three to five miles an hour - no faster than the vehicles ahead of it. There was some little space between it and the traffic ahead. As one of the witnesses testified, deceased seemed to walk right into the truck. He was struck by its righthand front corner and knocked down, falling under the wheels. This version of the accident is supported not only by the occurrence witness produced by the defendant, but also by three of the four occurrence witnesses testifying on behalf of the plaintiff. According to the single witness who is in disagreement with the others, when deceased started to cross

and bowling.

the street the two whistle signal for the east and west traffic to move had been given; but in this he is contradicted by the police officer, the driver of the truck, and the pedestrians who saw the accident while they were waiting at the street corner for the two whistle signal which would clear the way for them to cross Clark street. As was said by this court in Thom Express & Storage Co. v. Kemper Bros. Co., 108 App. 85: "A preponderance is not established by the testimony of one witness, directly contradicted by two at least equally credible witnesses, one of whom was called by the plaintiff itself." Of similar import are the decisions in Donahue v. Scott Transfer Co., 141 Ill. App. 174; Heide v. Schubert, 166 Ill. App. 586; Peasles v. Glass, 61 Ill. 94; McFadden v. C. N. I. & P. Ry. Co., 143 Ill. App. 248; Broughton v. Smart, 59 Ill. 440. Plaintiff in the instant case has not only failed to prove the allegations of his declaration by a preponderance of the evidence, but the defendant's claim as to the facts is supported by the manifest preponderance of the testimony from both plaintiff's and defendant's witnesses. We are of the opinion that the only reasonable conclusion which can be drawn from the evidence exonerates the driver of the truck from any causal negligence with reference to the accident and places upon the lack of care and prudence of the deceased the responsibility for the unfortunate occurrence.

In view of this conclusion it is unnecessary to consider other points presented by the defendant in argument, and upon them we express no opinion. For the reason above indicated we hold that there can be no recovery

in this case, and the judgment is reversed without remanding, with a finding of facts.

REVERSED.

182 - 22134 FINDING OF FACTS.

The court finds from the evidence that the defendant was not guilty of the negligence charged in plaintiff's declaration, but that the accident occurred through the negligence of the deceased, Henry H. Grimm.

185 - 22137

JOHN A. McCLUN,
Plaintiff in Error,

vs.

THEODORE FURNYA,
Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

199 I.A. 556

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Theodore Furnya, defendant, intending to purchase real estate from Catherine Joyce, paid to her agent, John McClun, the plaintiff, $100 earnest money, - $80 cash and $20 by his note. The deal did not go through, but plaintiff seeks to collect the amount of the note. Upon trial he was defeated, and now insists that this adverse judgment was improper. With this contention we cannot agree.

The contract was entered into on February 4, 1915. By its terms it was provided that an abstract or a guaranty policy should be furnished to the defendant "within a reasonable time," also that a loan of $1,000 drawing interest at six per cent. should be furnished to defendant within sixty days from the date of the contract, and if the loan was not furnished the contract was to be null and void and the earnest money returned to defendant. The evidence shows that although defendant made repeated efforts to obtain an abstract or guaranty policy, and was given many promises that it would be delivered to him, none was furnished; that when sixty days after the date of the contract had expired, and several days thereafter, and neither an abstract, guaranty policy nor the loan contemplated by the contract had been furnished, defendant served notice upon Catherine Joyce and the plaintiff of his election to terminate the contract.

The evidence also shows that no guaranty policy was ordered until about ninety days after the signing of the contract. The court could reasonably find from the evidence of attorneys practicing at the Chicago bar and experienced in handling real estate deals, that it would take at the longest only fourteen days to procure an abstract of title or a guaranty policy.

The deal having failed of consummation through the default of the seller, defendant was entitled to the return of his earnest money. Plaintiff is not entitled to recover upon the note. The judgment of the Municipal Court is affirmed.

AFFIRMED.

218 - 22171

HENRY M. LAUDERDALE and HARRY H. LAUDERDALE, doing business as Lauderdale & Son, Defendants in Error, vs. WILLIAM DOWNS, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

199 I.A. 563

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant seeks to have reversed a judgment of $180 against him, obtained by plaintiffs in a suit for commissions as brokers on a real estate transaction.

The only issue involved is one of fact. Counsel agree as to the law.

From the evidence the court might reasonably find that in June, 1915, defendant engaged the plaintiffs, who are licensed real estate brokers, to sell a piece of real estate belonging to him; that defendant agreed to sell the property at a price of $5,250, and to pay the plaintiffs the Chicago Real Estate Board rate commissions, and that the property was listed with plaintiffs upon these terms; that plaintiffs submitted the property to Paul B. Scholz, and at the same time informed defendant that Scholz was the buyer secured by them; that Scholz made the brokers and also the defendant an offer on the property, and after defendant had raised his price several times the defendant and the buyer came to terms, and in August, 1915, the property was conveyed to Scholz.

The evidence abundantly justified the conclusion of the court that plaintiffs not only furnished a purchaser ready, willing and able to buy the property in question, but

that he actually did buy it. Under these facts plaintiffs were entitled to the commission as agreed upon.

The judgment is right and is affirmed.

AFFIRMED.

255 - 22209

CHARLES L. HANSEN,
Appellee,

vs.

BEST BREWING COMPANY OF CHICAGO, a corporation,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

199 I.A. 565

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

By his bill in chancery complainant sought to restrain defendant from enforcing the terms of a lease of certain premises in Chicago, made by defendant to complainant. Upon hearing the court granted the relief prayed for, from which decree defendant appeals to this court. We have not been favored by any brief or argument on behalf of the appellee.

By a written lease, dated August 16, 1909, defendant leased to complainant certain premises, the rental payable in monthly installments of $265 each, with a provision that if complainant should comply with and faithfully perform each and every condition therein contained he would be credited with or paid by the lessor out of the money so received the sum of $100 per month. By the terms of the lease complainant agreed that during the entire term he would purchase all beer that he might use or sell on the premises from the defendant. He was given permission to sell bottled or imported beer as stated in the following clause:

"Party of the second part (lessee) shall have the right, however, to purchase and sell bottled or imported beer from other persons, firms or corporations, and use or sell the same in said premises, but this right shall be optional with the party of the first part (lessor), and shall be terminated upon thirty days' notice in writing given by the party of the first part (lessor) to party of the second part (lessee). Said party of the second part (lessee) shall

358 - 22209

[illegible],
Appellee,

vs.

[illegible] BREWING COMPANY OF
ILLINOIS, a corporation,
Appellant.

[illegible] I.A. 65

MR. [illegible] JUSTICE [illegible]
DELIVERED THE OPINION OF THE COURT.

By his bill in chancery complainant seeks to restrain defendant from enforcing the terms of a lease of certain premises in Chicago, [illegible] to complainant. Upon hearing the entire record the [illegible], from which decree defendant appeals to this court. We have not been favored by any brief or argument on behalf of the appellee.

By a written lease, dated [illegible], defendant leased to complainant certain premises, the rental payable in monthly installments of [illegible] each, with a provision that if complainant should comply with and faithfully perform each and every condition thereof [illegible] to be paid by the lessor out of the money so received the sum of $200 per month. By the terms of the lease complainant agreed that during the entire term he would [illegible] he might use or sell on the premises [illegible]. He was given permission to sell [illegible] in the following clause:

"Party of the second part (Lessee) shall have the right, however, to purchase and sell bottled or imported beer from other persons, firms or corporations, and use or sell the same in said premises, but this right shall be optional with the party of the first part (Lessor), and shall be terminated upon [illegible] notice in writing given by the party of the first part (Lessor) to party of the second part (Lessee). Said party of the second part (Lessee) shall

immediately upon receipt of such notice cease to purchase such bottled or imported beer and sell such bottled or imported beer as he then shall have in stock within said thirty days."

In June, 1912, defendant notified complainant to stop using and selling bottled beer in his saloon, as provided in said clause, and that his refusal would be considered a violation of the terms and conditions of the lease. Complainant refused to comply with this notice. Thereupon defendant refused to give him the monthly credit of $100, and as the lessee refused to pay the sum of $265, the monthly rental provided for in the lease, judgments for the full amount by confession were entered against him. Complainant thereupon filed this bill of complaint, alleging that the clauses in the lease giving defendant the right to terminate the sale of bottled beer upon the premises, and providing for payment of rental at the rate of $265 per month, were mere matters of form; that he was told that no attempt would ever be made to enforce either of these conditions, and that he could sell at all times all the bottled beer he wished, and pay only $165 per month. The bill further alleged that defendant made to complainant a loan of $5,000, secured by his notes and trust deed; that he has paid said note and interest in full but that the defendant company refuses to turn over to him the possession of said principal note and the coupon notes or the trust deed.

The defendant answering avers that complainant was fully aware of the contents and the terms of the lease, denies that any misrepresentations were made regarding its recitals, avers that the right of complainant to sell bottled or imported beer from other persons on the premises was optional with defendant and could be terminated upon notice, that such notice was given and that complainant has refused to comply with the same; that because of such failure to comply with his agreement complainant is not entitled to a credit of n$100 on

immediately upon receipt

his monthly rental but is obligated to pay the full sum of $265 for each month in accordance with the terms of the lease. Defendant says as to the $5,000 note and trust deed that it had sold the papers, but that it would ascertain where they were and endeavor to arrange for complainant to secure a proper release.

Reference was had to the master, who took testimony and returned the same to the court with his report. Objections and exceptions were filed and overruled, and the court entered a decree in accordance with the recommendations of the master.

By its decree the court finds substantially that in August, 1909, complainant entered into an agreement with one Charles P. Hill for the purchase of a saloon; that Hill was the owner of the building in which the saloon business was conducted, and that he made an agreement with complainant to lease to him said premises for a period of 86 months, to commence September, 1909, at a monthly rental of $165; that in pursuance of an agreement made between the brewing company and Hill and complainant, Hill executed a lease to defendant of the premises for a monthly rental of $165, and the defendant in turn leased the premises for the same period of time to complainant at the rental of $265. The decree finds the fact with reference to the provisions of the lease and the service of notice upon complainant with reference to the bottled beer, substantially as hereinabove stated.

Where there is no fraud or mistake in the preparation of an instrument, and it appears that the parties signing understood its language and purpose, its covenants will be enforced. Evidence that there was such an understanding as claimed by complainant is not convincing. There is practically only the testimony of complainant, which is directly contradicted by the testimony of the president of the defendant

company, in which he was corroborated by other testimony. Complainant has the burden of proving that the contract does not contain the true understanding of the parties, and we cannot say in this case that he has established this by the preponderance of evidence.

The fact that the enforcement of the obligations assumed by the lease may work a hardship upon complainant cannot be ground for equitable relief. There must be present some element of fraud or mistake, and this element complainant has failed to prove. Apparently he entered into the transaction with his eyes open and understanding fully the great advantage which the lease gave to the lessor. Possibly he was induced to enter into this arrangement by his desire to obtain from defendant the loan of $5,000 with which to purchase the saloon business from Hill; but whatever the inducement was, having willingly and knowingly contracted as he did, he cannot now justly be heard to complain of the onerous provisions of the lease. Our conclusion in this matter is in accord with the opinion in Smith v. Rust, 112 Ill. App. 84, where one of the parties signed a joint and several lease with, as was claimed, an understanding that he should pay only half of the rental therein reserved. In that case it was said that the lessor had represented that if the lessee would sign the lease he, the lessor, would hold each of the joint tenants for half the rent only. The court in its opinion said:

> "Here is neither fraud, accident or mistake, at least one of which must be clearly shown to exist before a court of equity will interfere to reform the writing. Rust, before he executed the lease, knew its form and the legal effect of that form upon him if he joined in its making. Yet, knowing these things, he voluntarily entered into this sealed obligation trusting to the promise of Smith that he, Rust, should not be held for more than one-half of the stipulated rent. Under these circumstances, the promise is not a bar to an action at law for the unpaid rent, nor can it be the foundation of a bill in chancery to set aside a judgment entered upon the lease."

company, in which he was concerned, [illegible]
Complainant has the burden of proving that the evidence upon
not contain the true understanding of the contract. [illegible]
cannot say in this case that Mr. [illegible] satisfied [illegible] by the
preponderance of evidence.

The fact that the enforcement of the [illegible]
assumed by the lessee may work a hardship upon [illegible]
cannot be ground for equitable relief. [illegible] the [illegible]
some element of fraud or mistake, and this element, [illegible]
has failed to prove. Incidentally he [illegible]
with his [illegible]
which the lease gave to the lessor. [illegible]
to enter into this [illegible]
defendant the sum of $8,000 which [illegible]
business from [illegible]; but whatever the [illegible]
willingly and knowingly [illegible] to be done, [illegible]
justly be heard to complain of the [illegible]
lease. Our conclusion in this matter is in [illegible] with the
opinion in [illegible], [illegible], 64, [illegible] of the
[illegible] signed a lease and covenant [illegible]
on modern building [illegible]
[illegible] reservoir. [illegible]
and represented that if the lessee [illegible]
the lessor, would [illegible]
rent only. The court in its opinion [illegible]

"Here in neither [illegible]
lease one of which [illegible]
[illegible] will interfere [illegible]
before he entered the lease, [illegible] the light
effect on [illegible] in its [illegible]
[illegible] the [illegible] to the [illegible]
[illegible] to the [illegible] of [illegible]
[illegible] not be held for [illegible]
[illegible] lease, [illegible]
be not a bar to [illegible] for [illegible]
[illegible] it to be the [illegible] of [illegible] to [illegible]
a judgment entered upon the [illegible]."

"If we adopt the theory of Rust as to the facts herein, this established rule of the law seems to work individual hardship. Notwithstanding this, it is our duty to apply the rule to every case coming before us which plainly falls within its provisions."

We hold that the chancellor was in error in decreeing that the defendant be restrained from confessing any judgments against complainant under the lease for any rental exceeding $165 per month. Defendant is entitled to recover the full amount of the rental reserved in the lease.

We further hold that the court properly ordered and decreed that the defendant deliver up to complainant the principal note of $5,000, with the coupon notes and trust deed.

The decree will be reserved and the cause remanded with directions to enter a decree denying to complainant any restraining order with reference to the rental reserved in the lease and the right of defendant to collect the same; the decree shall also order that the defendant deliver to complainant his principal note, coupon notes and trust deed above described.

REVERSED AND REMANDED WITH DIRECTIONS.

188 - 22140

ANTONINA MICHALSKY and
FRANK MICHALSKY,
Defendants in Error,

vs.

SALVATORE PISANO and
JOHN TORRIO,
Plaintiffs in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

199 I.A. 571

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

John Torrio contracted with Antonina Michalsky to sell to her the real estate described as lots four and five except the south two feet of lot five, being 46 by 100 feet in Poyntz subdivision, etc., at the price of $6200. Torrio paid to Pisano $200 earnest money, agreeing to pay the remainder at the time specified in the contract. The contract and earnest money were to be held by defendant Pisano for the mutual benefit of the parties concerned, and he was to apply the earnest money, first, to the payment of expenses, and, second, to the vendor's broker as a commission on the selling price for his services in procuring the contract, rendering the overplus to the vendor. The defense stated by Pisano was that "this defendant acted as a broker in the matter of the sale referred to in the contract in question; that plaintiffs themselves, without legal ground, refused to carry out said contract, and the plaintiffs, under the terms of said contract, have no claim upon the money deposited with this defendant and have stated no cause of action against this defendant in the statement of claim filed by them." The condition stated in the contract was that Torrio should furnish to Antonina Michalsky a good and sufficient warranty deed conveying the premises to her. This

he failed to do and Pisano thereby became bound under the contract to return the earnest money.

Torrio did not assign error, but was summoned and judgment of severance entered, and Pisano alone assigns error on the record.

On the trial the jury found the issues for defendant Torrio, also found the issues for the plaintiffs and against defendant Pisano, and assessed plaintiffs' damages against Pisano at the sum of $200.

The alteration in the contract made by the attorney of the defendant was not a material alteration. Antonina Michalsky bought lots four and five except the south two feet of lot five, and the alteration only made the deed correspond with the contract.

On the merits the judgment is right. Pisano was clearly liable for the earnest money. In form the judgment is erroneous. The suit was against two defendants - Pisano and Torrio - and the rule is that where a plaintiff brings suit on a contract against two or more, he must recover against all of the defendants or none. But as the point was not made in the trial Court the defect was cured by verdict.

The record is free from reversible error and the judgment for the plaintiffs against Pisano is affirmed.

JUDGMENT AFFIRMED.

224 - 22177

HUGO ASH,
Defendant in Error,

vs.

ISIDOR OPPMAN,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

199 I.A. 573

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This writ of error is prosecuted to reverse a judgment for the plaintiff Ash against defendant Oppman for $1000, brought to recover real estate commissions for the sale of real estate by Ash as broker for Oppman to ~~one Silver~~. On the back of the contract of sale Ash made the following endorsement: "My commission is dependent upon the actual consummation of the within sale and the payment of the purchase price." This contract was prepared and not signed by Oppman and Silver, but the endorsement as to commissions was signed by Ash. A second contract was prepared by defendant's attorney, was signed by Oppman and Silver, and the following endorsement made thereon was signed by Ash: "I agree with Isidor Oppman that I shall be entitled to commissions only in the event that this contract is fully consummated and the purchase money actually paid."

The evidence ~~is~~ was conflicting, but from it the Court might properly find that Silver made no offer to perform on the day when performance was to be made, but was by the terms of his contract with Oppman in default. The usual rule where a broker has been employed to effect a sale of property is that if he finds a purchaser of sufficient responsibility willing to take the property on the terms stated, he has performed his contract and is entitled to his commission. The fact that either party has refused

subsequently to carry out the contract does not affect the right to commissions, which have already accrued; but the plaintiff does not stand on the usual contract of a broker and his rights are not to be fixed by the rules applicable to that contract. He alleges that he made a special contract with the defendant Oppman and by that contract his rights are fixed. That contract provides that he should be entitled to commissions only in the event that the contract is fully consummated and the purchase money actually paid. Under the terms of this agreement, before he can recover his commissions he is bound to show that the contract between Oppman and Silver was performed or that performance was prevented by the defendant.

Where a specific agreement is entered into between a vendor and a broker, whereby the amount and payment of commissions is made dependent upon a condition precedent, the broker has no cause of action and is not entitled to such commissions until the happening of the event stipulated in the agreement covering such payment. Seymour v. St. Luke's Hospital, 28 App. Div. (N. Y.) 119; Cooper v. Oneill, 103 N. Y. Supp. 122. It appears and is not disputed that Silver made no offer to perform at any time when the performance was to have been made, and he was by the terms of his contract in default. This gave to defendant Oppman his choice either to bring an action against Silver for specific performance of the contract, or to sue him for damages which he suffered by reason of his failure to perform, or to accept the act as a forfeiture of the contract on the part of Silver. He was at liberty, so far as his own rights were concerned, to take any one of these courses which he deemed most expedient. He was under no obligation to Ash to do any act whatever in the premises. Silver had, by his failure to per-

form, forfeited his rights under the contract. The defendant had assumed no duty toward the plaintiff which required him to take any steps to compel the enforcement by Silver of the agreement which he had made. He occupied toward Ash no position of confidence, but all that he could insist upon was that if Silver performed his contract the defendant should be allowed to perform his contract, and if that were done, or if the failure to do it occurred because of the neglect of the defendant, Ash had the right to his commissions; but defendant was not called upon, after Silver had forfeited his rights under the contract, to commence any action involving himself in any litigation to enforce the forfeiture of the contract to the benefit of Ash. The contract was at an end if the defendant saw fit to so regard it; and when it was at an end Ash's right to recover his commissions was gone. He had no interest in the contract itself. He had no right to compel the performance of it by Silver; but while the defendant at that time had the right to perform the contract if Silver had been willing to do so, yet he could not perform it unless Silver did, and Silver having forfeited the contract and thereby shown his intention not to carry it into effect, the defendant was at liberty to accept the forfeiture, because the only other thing he could do was to bring an action to compel Silver to perform.

Upon the whole record we are quite clear that the judgment should be reversed and judgment of nil capiat entered here for the defendant Oppman.

JUDGMENT REVERSED WITH DIRECTION
TO ENTER A JUDGMENT OF NIL CAPIAT
FOR DEFENDANT OPPMAN.

257 - 22211

PETER DEWALD,
Defendant in Error,

vs.

FERDINAND DECKER,
Plaintiff in Error.

ERROR TO THE MUNICIPAL COURT OF CHICAGO.

199 I.A. 575

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for balance claimed to be due him for bonus or commission on goods sold by him for the defendant. The contention of the defendant was that plaintiff had not turned over to him all of his collections, defendant claiming that plaintiff was short in his returns by $225. ~~The evidence shows that~~ The parties agreed that a check for this amount should be placed in the hands of one John R. Kingsbury until December 21, 1911, by which time if it was ascertained that plaintiff had paid over all moneys collected by him from January 1, 1910, to October 21, 1911, then the amount of this check should be paid to him. ~~From the evidence the jury could properly find~~ The jury found that plaintiff had turned over to defendant all his collections except $39. ~~One of the convincing bits of evidence is the letter from the~~ defendant to plaintiff under date of December 8, 1911, in which he wrote a letter requested that plaintiff permit defendant to retain the money represented by the check held by Mr. Kingsbury for the reason "that we are very short of money at the present time, but would be able to give it to you at the time specified. Hoping you will not be inconvenienced by not having the money, we beg to remain", etc.

The jury found in favor of the plaintiff in the sum of $186, having given credit to the defendant for $30. We hold that the verdict is supported by the evidence, the record is free from error, and the judgment is affirmed.

AFFIRMED.

165 - 22114

NORMAN JOHNSON,
Defendant in Error,

vs.

SUSAN DELLAS and ANTON J. CERMAK, Bailiff of the Municipal Court of Chicago,
Plaintiffs in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

199 I.A. 576

MR. JUSTICE ROLSON DELIVERED THE OPINION OF THE COURT.

This is a statutory action involving the "trial of the right of property." The property in question was seized by Cermak as bailiff under a judgment in the Municipal Court in favor of Susan Dellas and against Norman Johnson. The trial was before court and jury. The verdict found the right of property in Norman Johnson, and the court entering judgment thereon Dellas and Cermak bring the record to this court for review.

The property involved was claimed to be exempt from levy and sale on execution, pursuant to Sec. 13, Chap. 52, R. S., title "Exemptions." (J. & A. A et. seq.)

Norman Johnson sent to the bailiff a schedule of the property which was subsequently levied upon under the Dellas execution and which Johnson claimed to be exempt from levy. The statement was signed but not verified. Sec. 14, Chap. 52, supra, (J. & A. A) provides that such schedule shall be subscribed and sworn to by the debtor. The act further provides that such schedule shall be furnished the officer within ten days of his serving a copy of the writ, in the same manner as summonses are served in chancery. The copy of the writ was left with Johnson's wife at his residence and the schedule was sent to the bailiff within the statutory ten days there-

after. Herman Johnson insisted at the trial that the service on his wife of the writ by copy at his residence did not fulfill the statutory requirement. The purpose of the law in requiring copy of the writ to be served the same as summonses in chancery is to give the debtor an opportunity to make a schedule and claim exemption within ten days. The leaving of the copy of the writ with Mrs. Johnson evidently served its purpose, for Johnson sent his schedule to the bailiff in due time. The real difficulty lies in the fact that he failed to fully comply with the terms of the statute in that he did not verify the schedule with his oath. At the close of Johnson's proofs Bellas and Cermak moved for an instructed verdict in their favor, which was denied. This action of the court was erroneous. The motion to instruct should have been allowed. Johnson had failed to comply with an indispensable requirement of the statute. The oath to the schedule was imperative to make it effective. Lacking it, Johnson's case failed.

An unsworn schedule is insufficient and is not a compliance with the statute. Finlen v. Howard, 126 Ill. 259; Casper v. The People, 6 Ill. App. 28; Cook v. Bohl, 8 ibid 293. The bailiff was not required to take any notice of the unsworn schedule sent to him by Johnson.

The judgment of the Municipal Court is reversed and the cause is remanded with directions to the Municipal Court to enter an order finding the title to the property set forth in Johnson's statement of claim to be in Anton J. Cermak as bailiff of the Municipal Court of Chicago, and to be rightfully held by him under a levy made by him thereon on June 19, 1915, in virtue of an execution issued on a

Judgment for $70 and costs, rendered by said Municipal Court in favor of Susan Bellas and against Norman Johnson in suit No. 397080 on June 5, 1915.

REVERSED WITH DIRECTIONS.

207 - 22189.

TRINITY METHODIST EPISCOPAL CHURCH OF CHICAGO, a corporation,
Defendant in Error,

vs.

MARIN METHODIST EPISCOPAL CHURCH OF CHICAGO, a corporation, and JAMES M. WHEATON,
Plaintiffs in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

199 I.A. 580

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Defendants seek by writ of error in this case to have this court review and reverse a judgment against them in an action upon a "stay bond" for $1,200 debt and $702 damages, debt to be discharged upon the payment of the damages assessed.

Counsel for defendants attempt to argue a part of their cause on page 8 of the abstract, where they contend that "There is nothing to indicate how many jurors were called or that they were sworn to assess the damages, or who or what were called as a jury." The abstract is not the place to indulge in argument. But were this contention well taken it comes too late when made here for the first time. However, the record shows that there were twelve jurors called, all of whom signed their names to the verdict, and that they did assess the plaintiff's damages. We will assume that after judgment, without challenge on the ground of irregularity in the proceedings in this regard, all the steps taken eventuating in the impanelling of the jury and the rendering of their verdict were regular.

There has been a former review of this case by this court, the decision of which is reported in the 192

Ill. App. 223, where all the essential facts are recited and for such facts we refer to that decision. The cause was reversed for the error of the trial judge in refusing to impanel upon the demand of defendants a jury to assess damages. The damages being unliquidated, defendants were entitled to have them assessed by a jury. Had they been liquidated a jury would not have been necessary. The court on the first trial erroneously assessed the damages at $1,200, the penalty of the bond, upon the statement of counsel, while the jury, after hearing the evidence, assessed the damages at the lesser sum of $702, thereby exemplifying the wisdom of this procedure.

The cause last went to trial upon the same issues as were joined at the time of the former review. Defendants' affidavit of defense had theretofore been stricken from the files, which action of the trial judge this court in its former opinion held to be proper. Defendants, after the striking of their affidavit of defense, were without any defense upon the merits; they were, in fact, in default for want of a sufficient affidavit of merits, and therefore all that remained to be done was to assess the damages of plaintiff, and all defendants had the right to do on such assessment was to cross examine witnesses in diminution of damages. Binz v. Tyler, 79 Ill. 243.

Every material averment of the statement of claim stood admitted in this state of the pleadings. Buck v. Citizens Coal Mining Co., 254 Ill. 198. Suffering a default is an implied admission that there is no defense. We take it that as defendants were not entitled to put in any defense they offered none. At least the record does not disclose any proffer of proof on their part in diminution

of damages or otherwise.

The bond sued upon was offered in evidence. It was sufficient evidence of all of its recitals without further or other proof. The evidence in the record concerning the rental value of the premises recited in the bond contains prima facie proof of their identification. The recital of the judgment in the bond was sufficient proof of its existence; resort to the court record to prove it was unnecessary. Defendants were estopped from denying the judgment recited in the bond or any other fact stated therein. McCarthy v. Alphons, etc. Co., 219 Ill. 616.

The judgment of the Municipal Court being right is affirmed.

AFFIRMED.

231 - 22185

WILLIAM A. SMITH,
Defendant in Error,

vs.

THE LORD & BUSHNELL CO.,
a corporation,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

1991.A. 582

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This writ of error brings in review a judgment for $370.84 in favor of plaintiff and against defendant, entered upon the verdict of a jury.

Plaintiff bought of defendant certain lumber and paid for the same. The controversy relates to 26,000 feet of the lumber, which defendant, it is claimed, failed to deliver to plaintiff. Between the time of the purchase of the lumber and the repurchase by plaintiff of the shortage in delivery, the price of lumber advanced. The contract price was $7 per thousand feet and the market price which plaintiff paid for the 26,000 feet not delivered was $14 per thousand. Plaintiff sought to recover the sum paid for the 26,000 feet of lumber at $7 per thousand, with interest at five per cent. from August 6, 1918, the date when the payment was made, and also the difference between the contract and market price at the time plaintiff purchased the same to make good the shortage in delivery of the 26,000 feet of lumber.

There was some correspondence between the parties regarding the sale and purchase of the lumber. The contract for 186,000 feet of lumber was orally made between plaintiff and one A. A. Henry, the secretary of the defendant company. It appears that defendant had a large amount of lumber stored

with Swallow & Hopkins at Winton, Minnesota, and it was agreed between the parties that plaintiff should send to Swallow & Hopkins orders for the lumber purchased, and that Swallow & Hopkins would send plaintiff a memorandum of the amount loaded on each car, car number and date of shipment, and that afterwards defendant would send plaintiff invoices for the lumber so shipped. Plaintiff paid to defendant July 24, 1912, by post-dated check of August 6, 1912, $1302 for the 186,000 feet of lumber due plaintiff under his contract, and defendant gave plaintiff an order on Swallow & Hopkins to ship to him the 186,000 feet of lumber upon plaintiff's order. This agreement was carried out as to 159,952 feet of lumber, leaving about 26,000 feet undelivered. Swallow & Hopkins refused to deliver to plaintiff the latter quantity of lumber.

Defendant, in its affidavit of meritorious defense, admits the sale of the 186,000 feet of lumber and the payment of $1302 therefor by plaintiff, but claims that defendant gave to plaintiff an order on Swallow & Hopkins for the whole of the 186,000 feet of lumber, which plaintiff accepted, and defendant ~~now~~ contends that such order operated as a delivery of the lumber sold and a full compliance by defendant with its contract with plaintiff.

The lumber sold, defendant claims, was stored with Swallow & Hopkins at Winton, Minnesota, ~~but we think it significant, upon the question of complete delivery,~~ that the lumber was agreed to be delivered f. o. b. cars at Duluth, Minnesota. As bearing upon the question of complete delivery, defendant offered in evidence a letter of July 22, 1912, writ-

ten to plaintiff, in which it said:

"We enclose herewith our memorandum invoice for 186,000 ft. If you will mail us a check for the amount of this invoice less 2%, we will then tell Swallow & Hopkins that the balance of our 6 boards belong to you and that you will correspond with them direct in regard to shipments. We must guarantee, however, that the entire quantity will be moved before September 1st.

Please let us hear from you promptly as the writer will not be here after this week."

This letter plaintiff answered by a personal visit to defendant, when the contract in controversy was made. Thereupon, on July 24, 1912, defendant wrote the following letter to Swallow & Hopkins:

"We have sold to William A. Smith of Oconto, Wisconsin, 186,000 feet of 4/4 6 boards. Please accept Mr. Smith's orders for the shipment of this lumber, which will probably take all that we have left in the pile, invoicing to us in the regular manner, giving Mr. Smith only a memorandum invoice showing car number and quantity loaded."

From the evidence in the record, including the two letters last referred to, and the environing circumstances, as well as the admitted fact that the sale was f. o. b. cars Duluth, we think the jury might well have concluded that there was no complete delivery of the lumber and that the responsibility of delivery was not shifted from defendant to Swallow & Hopkins. With this conclusion of the jury we are in accord. There is not in this record any evidence from which it might be inferred that plaintiff accepted the order upon Swallow & Hopkins as a complete delivery of the lumber bought and paid for, or showing an intention to release defendant from further responsibility, or that the contract became a closed incident between plaintiff and defendant. The liability of each to the other remained the same after the giving of the order for the lumber on Swallow & Hopkins as before the order was given. The defendant still remained responsible to plaintiff to deliver the lumber in accordance with the contract made and liable in

damages for any breach of duty thereunder. The failure of Swallow & Hopkins to deliver all the lumber upon the order of plaintiff became the dereliction of defendant, for which it is liable to respond to plaintiff for damages suffered by reason of such failure to deliver.

There was no privity of contract between plaintiff and Swallow & Hopkins, and in the situation of the parties the latter could not be held to answer in damages to plaintiff for any failure to honor the order of defendant for delivery of its lumber sold to plaintiff. Swallow & Hopkins' obligation in the premises, if any, was to defendant, not to the plaintiff. The order given by defendant to Swallow & Hopkins to ship 186,000 feet of its lumber to plaintiff did not operate to transfer the title to such lumber to plaintiff or constitute a symbolical delivery of the lumber, as contended by defendant.

The trial of the cause was circumscribed to the pleadings of the parties, which consisted of plaintiff's statement of claim and defendant's affidavit of meritorious defense. [Defendant limited its defense to its claim of delivery to plaintiff of the lumber contracted to be sold. It did not question the market value or the grade or quality of the 26,000 feet of undelivered lumber set forth in plaintiff's statement of claim; therefore the trial Judge correctly sustained an objection to defendant's offer to prove that the market value or the grade and quality of the lumber in controversy were different from those appearing in plaintiff's statement of claim. Rule 19 of the Municipal Court, which we find in the record, provides that "Every allegation of fact in any statement of claim or of counter claim or set-off, if not denied specifically or by necessary implication in the affidavit of defense filed in reply by the opposite party, shall be taken to be admitted."

This rule has been by this court upheld and given effect in accord with its purport in numerous decisions, among which may be cited: Corbett v. N. K. Metal & Mfg. Co., 144 Ill. App. 481; Hamill v. Watts, 180 ibid 279; Leonard v. Union Pacific R. R. Co., 180 ibid 410; Kahn v. City, 176 ibid 411. Had defendant desired to avail of the excluded defenses it should have set them forth in its affidavit of defense. Failing so to do, they were properly excluded when proffered upon the trial.

Defendant's abstract is imperfect in some material particulars, and the cost of the additional abstract will therefore be taxed as costs in the cause.

There is no reversible error in this record, and the judgment of the Municipal Court is affirmed.

AFFIRMED.

234 - 22188

(1734)

CITY OF CHICAGO,
Defendant in Error,

vs.

CHARLES ZITNY,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

199 I.A. 585

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Defendant waived a trial by jury under a complaint charging him with violating Sec. 1539 of the Revised Municipal Code of Chicago, in that he, on the 26th day of December, 1915, at the city of Chicago, "did then and there sell or give away in quantities less than one gallon of spirituous or intoxicating liquor without first procuring a license to sell the same." The trial Judge after hearing all the evidence proffered found the defendant guilty and punished him by the infliction of a fine of fifty dollars, casting him in the costs of the prosecution and ordering his confinement in the house of correction until such fine and costs were paid or worked out in such house of correction at the rate of fifty cents per day; but in no event was the imprisonment to continue for a space of time exceeding six months. ~~Defendant seeks our review of this judgment and asks a reversal.~~

The errors assigned are encompassed within the contentions that the judgment is contrary to the probative force of the evidence; that the section of the ordinance alleged to have been violated is not to be found in the record, and that we cannot therefore take judicial notice of its provisions. If the last contention be well taken, then we must assume that the ordinance of which the trial Court must, under the statute, take judicial notice, although we

cannot, was proven by the evidence to have been violated as charged in the complaint. City of Chicago v. Baker, 157 Ill. App. 31, and same v. Penn, opinion not reported in this court, but being case number 20681. We are, however, of the opinion that sufficient of the section of the ordinance alleged to have been infringed appears in the complaint to inform us of its nature and quality and permit us to examine the evidence to determine whether defendant was guilty of violating it.

Defendant was the keeper of a restaurant. At three o'clock in the morning of December 26, 1913, defendant's restaurant was open and many persons of both sexes were found patronizing it. In certain cups of coffee rum was present. In the kitchen of defendant was found a jug of rum. These ~~were~~ incriminating circumstances ~~and~~ were not denied. Defendant attempted to explain the presence of the rum upon the theory that one of the customers had a bottle of rum and without the knowledge, consent or connivance of defendant, poured some of it into his own coffee and that of the others there present. ~~This may be so, but the trial Judge~~ evidently was not persuaded of the truth of such defense. The trial Judge saw the witnesses and from their manner and demeanor was better able to judge of the credit to be given their testimony than we are from such testimony appearing to us only from the record. The decision of the question whether the police officers were more worthy of belief than defendant and his witnesses was the burthen of the duty of the trial Judge, and we are not warranted in interfering with such decision unless we are persuaded from the proofs that his finding is not sustained by credible evidence appearing in the record. We are not so persuaded. It may be that the trial Judge was impressed from the appear-

ance of defendant and his three o'clock in the morning customers that after a day of Christmas celebration they were more thirsty for intoxicating liquor than hungry for food. In weighing the evidence the trial Judge may have drawn upon his experience acquired as a police court judge that the proprietors of so-called "blind pigs" often attempt to conceal their forbidden liquor traffic by the pretense of serving coffee and sometimes tea to the imbibers, when in fact the cups contain intoxicating liquor.

Seeing no good reason for disagreeing with the conclusions at which the trial Judge arrived, the judgment of the Municipal Court is affirmed.

AFFIRMED.

237 - 22191

FRANK ZUREK and MARTIN WIERBOWSKI,
Defendants in Error,

vs.

JOSEPH WERFECKI and REGINA WERFECKI,
Plaintiffs in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

199 I.A. 587

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

In this action for commissions under a contract for the exchange of real estate plaintiffs had judgment against defendants for $250, and defendants prosecute this writ of error and ask a reversal.

Plaintiffs ~~are~~ were real estate brokers and as such negotiated an exchange of real estate between defendants and others, in the contract for which the commission of the broker was fixed at $250. The trial Judge held that this contract for exchange of properties was binding upon the parties to this litigation and instructed the jury that if they believed from a preponderance of the evidence that that contract was substantially complied with, plaintiffs were entitled to a verdict. In obedience to such instruction the jury found the verdict challenged. Defendants offered to and did prove that the agreement as to commissions with plaintiffs was, "If they closed the deal they get a commission and if they don't close the deal they get no commission." This agreement as to payment of commissions was proven substantially as above recited by the testimony of three witnesses, ~~which~~ and was ~~is nowhere~~ contradicted. ~~This testimony the trial Judge entirely disregarded.~~ It ~~is~~ was ad-

mitted that the deal covered by the contract was never carried out.

The verdict and judgment are contrary to the manifest weight of the evidence. Defendants at the close of all the evidence moved for a directed verdict in their favor. As there was no testimony disputing or contradictory of the defense made, the motion to instruct a verdict for defendants should have been allowed and a verdict instructed accordingly. The failure to do so was reversible error.

The judgment of the Municipal Court is reversed, and as plaintiffs cannot recover on the evidence in the record, the cause is not remanded.

REVERSED WITHOUT REMANDING.

102 - 21076.

MORRIS NOVITSKY, Adm. of the Estate of SAMUEL NOVITSKY, Deceased, Plaintiff ~~in Error~~, vs. KNICKERBOCKER ICE COMPANY, a corporation, Defendant in Error.	ERROR TO SUPERIOR COURT COOK COUNTY.

199 I.A. 593

MR. PRESIDING JUSTICE FAM delivered the opinion of the court.

This is an action ~~brought~~ by plaintiff, in ~~error (plaintiff below)~~, against defendant, ~~in error~~ (defendant below), for damages alleged to have been sustained by reason of the death of Samuel Novitsky, ~~to whom we shall hereafter refer as the deceased. The first trial resulted in a disagreement of the jury, the second in a judgment for~~ $4,000 against the defendant, which, however, was reversed on appeal to this court. ~~On the present trial the jury~~ ~~found~~ the defendant not guilty, and upon a judgment for costs entered on said verdict, plaintiff ~~has~~ sued out this writ of error.

State street runs north and south; 19th street runs east and west, intersecting State street at right angles. At this intersection Archer avenue commences, running in a southwesterly direction from State street. Street cars are operated on both State street and Archer avenue. The deceased lived at 1824 State street with his parents, his home being north of 19th street. Plaintiff (the father of the deceased) ran a tailoring establishment at 1916 State

street, which was situated south of 19th street and south of Archer avenue. The accident in question occurred on October 5, 1903, between 5:30 and 6:00 P.M., while the deceased was crossing Archer avenue either at the crosswalk across Archer avenue on State street, or fifty or sixty feet west thereof, north of the north street car track on Archer avenue. The deceased came to his death by being run over by an ice wagon owned and operated by the defendant.

Plaintiff contends, and it was admitted by the defendant, that the deceased being only 7 years of age, was not chargeable with contributory negligence. Plaintiff also contends that the deceased at the time he met his death, had left plaintiff's place of business and was proceeding across the crosswalk on Archer avenue to his home north of 19th street, when he was run over by defendant's wagon; that the horses attached to said wagon were being driven at a fast trot and were not under proper control at the time and place in question; and that the parents of the deceased were in the exercise of ordinary care for his safety.

It was defendant's contention, that its team turned into Archer avenue from State street; that the accident happened on Archer avenue, just north of the north street car track, about 50 or 60 feet west of the crosswalk, while defendant's team was being driven on a slow trot in a southwesterly direction; that one or two cars were standing on Archer avenue, just west of the crosswalk; that the deceased suddenly darted out from the west or rear end of said cars, in front of defendant's moving team, which the driver, in the exercise of ordinary care, could not stop in time to

prevent the accident; that at the time in question, and while approaching the place of the accident, the driver was in the exercise of ordinary care.

The charges of negligence on which plaintiff relies were: (1) That defendant's team was being driven at a high rate of speed over a crossing in a congested neighborhood; and (2) that just prior to and at the time of the accident, the driver was not in the exercise of proper care to have his horses under control so they could be stopped immediately in case danger suddenly threatened a pedestrian. In support of these charges of negligence, plaintiff introduced the testimony of four witnesses, two of whom, viz., Joseph F. Golden and Nathan Goldsmith, testified that they saw the entire accident. A third witness (Lena Loberg) was attracted in time to see the rear wheel of defendant's wagon pass over the body of the deceased. Another witness, Isaac Daniels, saw the wagon turn into Archer avenue, but did not see any part of the accident; while plaintiff's knowledge was confined to certain conditions after the accident.

Defendant, in support of its contention, offered the testimony of 11 witnesses, eight of whom claimed to have been eye-witnesses. One Theodore Bruhnke, another witness, saw the circumstances leading up to the accident, but did not see the accident itself because his view became obstructed by an Archer avenue car which turned off State street into Archer avenue. Two other witnesses for the defendant saw the driver at the police station shortly after the accident.

On the question as to where the accident occurred, Golden and Goldsmith, testifying on behalf of the plaintiff,

stated on direct examination that it took place on Archer avenue, north of the north car track, either on the State street crosswalk, or a few feet west of it, and that at the time of the accident a street car was standing on Archer avenue about ten feet west of the crosswalk. Miss Loberg testified that when she saw the rear wheel pass over the deceased, he was lying on Archer avenue midway between the crosswalk and the patrol box which was located on the north side of Archer avenue, about 60 feet west of the crosswalk.

Eight witnesses on behalf of the defendant testified that there were at least two street cars on Archer avenue, one on each track, at the time of the accident. Martin Johnson, the driver, stated that he noticed but one car there. All but one of these witnesses testified that the deceased ran across Archer avenue around the west end of the street cars and into defendant's horses which were attached to the wagon proceeding along the north side of Archer avenue; that this took place about 50 or 60 feet west of the State street crosswalk, at or near the patrol box already referred to. Bruhnke, whose view was cut off just as the accident happened, testified that he observed the deceased run across Archer avenue west of the street cars.

On the question as to the rate of speed at which the defendant's wagon was proceeding at and just prior to the accident, and the manner in which the horses were being driven, one of the plaintiff's witnesses testified that the horses were going at a "fair trot;" that the driver was holding the reins loosely; and that the other man on the driver's

seat was "hitting the horses on the tail with the lines." Another of plaintiff's witnesses testified that the horses were advancing at a "rapid pace, considering two horses and as large a wagon as that;" that the driver called "get up" to the horses just before the accident. A third witness (Daniels) who, though not an eye-witness to the accident, testified that he stood on the northwest corner of State and 19th streets at the time of and just prior to the accident; that when defendant's wagon passed him the horses were going along on a "gallop;" on cross examination, however, he admitted that he did not know the difference between galloping and trotting. Daniels testified that the wagon went about 45 to 50 feet after the accident; Golden, about 50 to 60 feet; Goldsmith, about 60 to 70 feet.

On behalf of the defendant, Martin Johnson, the driver, and his helper, both testified that the horses, at and just prior to the time they turned into Archer avenue, were going along at a "dog trot," which was about four or five miles per hour, and that they continued to travel in that manner up to and at the time of the accident. The seven other witnesses for the defendant who saw the accident characterized the speed as "trotting," "not going fast,""slow trot," "ordinary trot;" seven of the witnesses for the defendant fixed the distance within which the wagon stopped after the accident at from 6 feet to 10 feet, one at 13 feet, and another at 25 feet.

At the conclusion of all the evidence, the court gave 13 instructions on behalf of the plaintiff, and 18 on behalf of the defendant.

Plaintiff, in urging a reversal, contends, first, that the court erred in receiving in evidence the verdict of the coroner's jury; and second, that the court erred in giving certain instructions on behalf of the defendant.

On the question as to the admissibility of the verdict of the coroner's jury, it would be a sufficient answer to plaintiff's contention to refer to the opinion of this court in the former hearing on a previous appeal (180 Ill. App.188) wherein we held that the court erred in excluding same, which holding must, therefore, be regarded as the law of the case.

In Devine v. Brunswick-Balke Co., 270 Ill. 504, where the same question arose, it was held that the verdict of the coroner's jury was admissible, notwithstanding it found the driver (Foy) blameless of the accident and that, in exercising their statutory functions, the coroner's jury were not invading the province of the courts. In the course of its opinion, the court said, p. 512:

> "The admissibility in evidence of the finding of a coroner's jury is now too well established by the authorities to be longer considered an open question in this State. The question as to whether or not Foy was blameless of the accident was an essential matter before the coroner's jury for their investigation and a proper matter to be included in their verdict and as such to go to the jury."

Plaintiff complains of instructions Nos. 2, 12, 13 and 17 given on behalf of the defendant.

An examination of instruction No. 17 shows that it but meets instruction No. 7 given on behalf of the plaintiff, and under the issues in the case, was properly given.

As to instructions Nos. 2, 12 and 13, it is urged that they were misleading in that they told the jury defendant was chargeable with the exercise of ordinary care only at the time of the accident, whereas defendant was duty bound to exercise ordinary care prior to and at the time of the accident.

With respect to instructions Nos. 12 and 13, we cannot concur in this contention, but are of the opinion that they conveyed a proper definition of defendant's legal duty. And while we are of the opinion that instruction No. 2 is inaccurate in limiting defendant's duty of exercising ordinary care to the time of the accident, yet in view of the record now before us, we are of the opinion that the error of the court in this regard was harmless. The issues in this case resolved themselves into two vital questions, viz., the place where the accident occurred, and whether or not defendant's wagon was operated negligently. On both these questions the evidence preponderated overwhelmingly in favor of the defendant. Not only did the defendant have the greater number of witnesses, but in some material respects the testimony of plaintiff's witnesses coincided with that given by the defendant's ; particularly is this true regarding the place where the deceased lay after the accident. All of defendant's witnesses who testified on this point, stated, with slight variations, that the deceased lay in the street, about on a line with the patrol box, which was 50 or 60 feet west of the crosswalk. Plaintiff's witnesses, Golden and Daniels, on cross examination admitted that after the accident the deceased lay close to the patrol box, while Miss Loberg, on direct examination, stated that

she saw the rear wheel of defendant's wagon pass over the deceased, half way between the crosswalk and the patrol box. This testimony by the plaintiff's witnesses is important in that it helps fix with a reasonable degree of certainty the place of the accident, and strongly tends to corroborate the defense in its contention that the accident occurred west of the crosswalk while the deceased emerged from the west end of the cars which at that time occupied Archer avenue.

Plaintiff, in his endeavor to show negligence on the part of the defendant, also introduced the testimony of four witnesses that the driver was intoxicated at the time of the accident. It was shown, however, on cross examination, that two of them, (Golden and Goldsmith) while testifying at the coroner's inquest a day or two after the accident, were asked whether the driver was intoxicated and they stated that he was not. Plaintiff, although a witness at the inquest, did not testify that the driver was intoxicated. The driver himself, although admitting having taken one drink of whiskey one hour before the accident, stated that he was not intoxicated. All of defendant's witnesses but one (who was silent on this question) testified that, to all appearances, the driver was sober and that there was no sign of intoxication about him. Some of them testified that immediately after the accident the driver took the names of witnesses to the accident. The evidence further shows that shortly after the accident the driver proceeded to the police station, about eight blocks distant from the scene of the accident, to report the mishap to the police. Two officers, one the desk sergeant and the other a patrolman, who saw and talked with him at

the station, testified that the driver showed no signs of intoxication.

We cannot but regard the testimony on that point as overwhelmingly against the contention of the plaintiff. The jury may well have regarded the testimony introduced on behalf of the plaintiff that the driver was intoxicated, as an endeavor to inject an element into the case to strengthen plaintiff's charge of negligence, without the slightest foundation for so doing.

In passing upon plaintiff's contention that the giving of instruction No. 2 on behalf of the defendant constituted reversible error, this court is in much the same position as was the court in the case of O'Donnell v. Armour Curled Hair Works, 111 Ill. App. 516. The deceased in that case met his death by being trapped by a fire in a building owned by the defendant. It was there urged that the verdict was manifestly against the weight of the evidence and that the court erred in refuding certain instructions and in the giving of others, and the court said p. 521:

> "Having read and re-read the evidence and considered it carefully, as the importance of the case demands, we can come to no other conclusion than that the jury would not have been warranted by the evidence in finding that defendants were negligent as charged in the declaration, and could not reasonably have so found. The evidence tends to show that the deceased imprudently tarried too long on the third floor after the fire was discovered, and when he finally attempted to escape, he probably was so exhausted by the heat, or blinded by the smoke, that he failed to make his way to the street from the bottom of the stairway shaft."

And on page 523 the court went on to say:

> "We do notapprove of the two instructions

Introduced on behalf

for the defendants of which plaintiff's counsel complain; but inasmuch as no other verdict than that of the jury could reasonably have been returned, the giving of the instructions is not reversible error."

As in the case at bar, we also have read and re-read all the evidence in the record, and are constrained to hold that the jury would not have been justified from the evidence in finding that defendant was negligent as charged in the declaration, and that the jury could not reasonably have found the defendant guilty. The evidence tends to show that the deceased, a lad of immature years, instead of going straight across the crosswalk when leaving his father's place of business, wandered down Archer avenue and crossed to the west of the cars standing there, directly into the path of defendant's horses, and was struck down and run over by the wheels of the wagon, without fault on the part of the man (Johnson) who was in charge thereof.

Finding no reversible error, the judgment will be affirmed.

AFFIRMED.

The decision on a former appeal in this case (180 Ill. App. 188), holding that he verdict of a coroner's jury was erroneously excluded from the evidence in the ase, is held to be the law of this case as to the admissibility of such verdict.

In an action for damages alleged to have been sustained by reason of death cause y being run over by a wagon, an instruction which limits the defendant's duty of xercising ordinary care to the time of the accident is inaccurate, but the giving f such instruction is not reversible error where the record in the case is overhelmingly in favor of the defendant as showing the defendant was not negligent as harged in the declaration.

An instruction given on behalf of the defendant which meets an instruction iven on behalf of the plaintiff, and is under the issues in the case, is properly given.

192 - 21169

PEERLESS PATTERN CO.,
a Corporation,

Defendant in Error,

vs.

WM. W. BARTHEN,

Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

199 I.A. 595

STATEMENT OF THE CASE.- Defendant in error (plaintiff below), recovered a judgment for $483.10 and costs against plaintiff in error (defendant below), for an alleged breach of a contract made entered into between the parties on January 6, 1910, whereby the defendant agreed to purchase dress patterns, fashion books and fashion guides from plaintiff for a period of three years from date of first shipment to defendant. At the time this contract was entered into, plaintiff delivered to defendant $255.00 worth of goods. A credit of $55.00, which had been previously agreed upon between the parties, was allowed on this $255.00, leaving a balance of $200.00, which, under the contract, was to be considered as a "standing debit," and was to draw interest at the rate of four per cent. per annum throughout the term of the contract, after the expiration of which, all conditions having been fulfilled, defendant could, under section 8 of the agreement, return all "live patterns in good saleable condition," at the original purchase price, in payment of the foregoing standing debit.

On June 18, 1910 (about 4½ months after entering into the aforesaid contract), defendant notified plaintiff

of his intention to discontinue handling its line of patterns, and returned his entire stock to the plaintiff, (including the four-section pattern case furnished by the plaintiff to him,) in payment of the standing debit of $200. The property was received by plaintiff and credit given defendant for $208.80 on "discard account," as indicated by a statement of September 1, 1910 rendered defendant.

Plaintiff's action was for the standing debit of $200, with interest thereon at 4% per annum, and for minimum damages sustained by reason of plaintiff's alleged breach of the contract.

~~MR. PRESIDING JUSTICE PAM delivered the opinion of the court.~~

It ~~is~~ was urged that plaintiff's claim of minimum damages, which was allowed by the jury and upheld by the court, ~~is~~ was based upon a palpable misconstruction of section 2 of the contract, wherein plaintiff was authorized to ship defendant "an assortment of new Pearless Patterns as issued at 5 cents each, not to exceed an average of $10.00 a month, one each size of every new pattern issued except 32 bust." (The portion in italics ~~is~~ was written in pen and ink, and the remainder ~~is~~ was printed.) Plaintiff contended that, under the section just quoted, defendant was bound to purchase at least $10.00 worth of patterns each month in any event. In our opinion, this is erroneous, for if such had been the intent of the parties, then the language, "one each size of every new pattern issued except 32 bust," would be meaningless. Manifestly, such construction would do violence to the well-established

rules, that the entire language of a contract should be construed together, and that where a written and a printed clause conflict, the former prevails. These words must have been inserted into the contract for a definite purpose, and a reasonable construction of the entire clause, including the written words, makes it evident that thereby the defendant was under no obligation to purchase $10.00 worth of new patterns per month from plaintiff, unless "one each size of every new pattern issued except 32 bust" amounted to $10.00. In other words, the language, "not to exceed an average of $10.00 a month," became a general limitation upon defendant's obligation to buy new patterns, applicable only in the event that the cost of each size of every new pattern (except size 32) would amount to more than $10.00 per month. It was in reality a provision fixing the minimum of new patterns the defendant was in duty bound to purchase each month under the contract. Under this construction of the contract, it might well happen that one of each size (except 32) of every new pattern issued monthly would not amount to $10.00 a month, in which event the plaintiff was not obligated to purchase patterns to the extent of $10.00. There being no evidence in the record from which it can be definitely ascertained how many new patterns were issued by plaintiff each month, nor the various sizes in which they came, it is obvious that the damages were improperly assessed.

Defendant further contends that the court in its instructions to the jury, erroneously permitted a recovery for the $200 representing the standing debit provided for in the contract. ~~A reading of the contract makes it apparent~~ that under the provisions of the contract ~~therein~~ con-

tained, defendant was to have on hand at all times a full assortment of patterns, and furthermore, at the conclusion of the contract, the terms having been complied with, defendant had the right to return all live patterns and receive full allowance therefor. ~~It is apparent that~~ this provision was not peculiar to the defendant but was general and applied to all with whom the plaintiff dealt. Within four and one-half months, ~~as the record shows,~~ defendant returned all patterns and also the cases in which they were contained, and wrote a letter ~~which clearly~~ indicated that the defendant did not intend to continue with the contract, and that it would be useless for plaintiff to send the patterns back or endeavor to send any new patterns. Plaintiff, on September 1st, and again during October, sent a statement to the defendant wherein defendant was given credit for $208.80, representing the amount of patterns returned, on the discard account.

As we view the case, the plaintiff, when it received the letter from defendant, knew that defendant was rescinding the contract. There is no question but that such action on the part of the defendant constituted a breach, and in litigation involving this same subject-matter a decree was entered finding that the defendant had committed a breach of contract. When these goods were accepted by the plaintiff and credited on discard account, plaintiff treated this property as its own, and had the right to dispose of it as it saw fit. While the contract provided that defendant might return patterns discarded by plaintiff and receive credit therefor, yet the evidence in the case clearly shows that defendant, in returning this property, did not return them to receive

credit on the discard account, but in payment of the "standing debit."

The evidence in this case shows that the action for damages was not begun until the end of the period which the contract had to run, viz., three years. Plaintiff was entitled to recover what damages it had suffered by reason of defendant's breach in returning the patterns within four and one-half months after the contract was entered into, and his refusal to continue with the contract. By allowing plaintiff damages for loss of profits during the entire period which the contract covered, as claimed by the plaintiff, the contract was practically enforced, and, so far as the plaintiff is concerned, must be held as having been fully performed. Therefore, under section 8 of the contract,- which provides that after the expiration of the contract, all conditions having been fulfilled, defendant may return all "live patterns in good saleable condition," at the original purchase price, in payment of the standing debit,- defendant was entitled to credit for the patterns returned. We are therefore of the opinion that plaintiff was not entitled to recover the sum of $200.00 representing the "standing debit," but only the four per cent. interest thereon, for four and one-half months, being the period of time that he retained the patterns. Plaintiff also had the right to recover, as minimum damages, its loss of profits, if any, which it sustained, under section 2 of the contract, based, however, upon the construction hereinabove placed thereon, and also for loss of profits, if any, by reason of the failure of defendant to order fashion guides in such numbers as provided for in said contract.

In this view of the case it becomes unnecessary

to pass upon the further points raised by the defendant.

For the reasons hereinabove assigned, the judgment of the Municipal Court will be reversed and the cause remanded for further proceedings not inconsistent with the views hereinabove expressed.

REVERSED AND REMANDED.

325 - 21309

A. MAGNUS SONS COMPANY,
a corporation,

Appellee,

vs.

ATLANTIC BREWING COMPANY,
a corporation,

Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

199 I.A. 598

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

This is an appeal from a judgment for $3,418.38 recovered by appellee (plaintiff below), against appellant (defendant below), in a suit for the contract price of machinery the subject-matter of a certain contract dated April 25, 1911, and for $300.00 due on open account, together with interest thereon at the rate of five per cent.

There ~~is~~ was no dispute between the parties on the open account. The difference ~~arises~~ arose out of a contract entered into between the parties on April 25, 1911, which was in the form of a letter and an acceptance, providing for the installation of certain machinery known as a Gabler Gas Collecting and Carbonating System. Said contract was as follows:

"Chicago, Illinois,
April 25, 1911.

Lutz Brewing Company,
Chicago, Illinois.
Gentlemen:

"We hereby propose to furnish you one Gabler Gas Collecting and Carbonating System consisting of one specially constructed, electrically driven gas Compressor, equipped with gas and gas

washing tanks, carbonator, necessary regulators, gauges and fittings, with 1 alternating current 220 v. 60 cyc. 3 phase A.C. motor for the Compressor; 1 60 bbl. Double Pipe Racking Cooler and 1 No. 0 Magnus Pressure Regulating Pump with motor, for the sum of $2700.00 F.O.B. Chicago. We to send an expert to superintend the erection of same and stay sufficiently long to instruct your brewmaster in the operation of fermenters and gas compressor.

"It is also a condition of this agreement that we hereby undertake and agree to save you harmless from any and all losses and damages of every kind, nature and description, sustained by reason of any alleged infringement, suit or suits arising out of the use of the Gabler Carbonating System, providing you notify us immediately after service of summons or other legal notice of the commencement and pendency of any such infringement suit or suits with the counsel of and at our expense.

"The foregoing system is to be installed on sixty days' trial from date of installation. If satisfactory, it is herein mutually agreed by the parties hereto as to the following terms:

$1000.00 to be paid on September 1st, 1911.
700.00 " " " " November 1st, 1911.
1000.00 balance to be paid on February 1st, 1912.

Respectfully submitted,

A. MAGNUS SONS COMPANY,

(signed) William Lewis,

Asst. Mgr.

Accepted:

LUTZ BREWING COMPANY,

(signed) I. H. Stone,

Manager."

It would serve no useful purpose to set out in detail the various machinery parts and connections that made up the said carbonating system. ~~It will be sufficient to merely state that~~ This system was used in connection with the brewing of beer and ~~that~~ its purpose was to collect the carbonic acid gas which forms at the top of the

beer in the fermenting tanks, then compress it so as to have a greater pressure, and then again force this gas through the beer, giving it life.

On the trial below, before the court and jury, plaintiff contended that the machinery called for in this contract was delivered; that plaintiff in every way complied with the provisions of the contract, save where it was prevented from so doing by the acts of the defendant.

Defendant contended that under the contract, plaintiff did not comply with the provision of the contract, in that the machinery furnished did not meet the requirements for which it was purchased; that it was not installed for a sixty days' trial as provided for in the contract, and did not prove satisfactory.

Plaintiff, on its behalf, introduced the contract in question. It further appeared from the testimony on behalf of the plaintiff, that during June after this contract was entered into and the machinery in question delivered, plaintiff sent one George F. Johnson, an expert, to install the machinery, superintend the erection of the same, and instruct the brewmaster in the operation thereof; that after said machinery was set up and installed and all connections made, it was found that the fermenting tanks used by the defendant were not suitable for use in connection with this system, in that they could not hold sufficient gas for the successful operation of the carbonating system, of which fact Johnson informed defendant's brewmaster, who then endeavored to strengthen

said tanks with iron bands; that this did not remedy the situation and, that thereupon, defendant's brewmaster admitted that said fermenting tanks were inadequate, and promised to replace them with new tanks; all of which took place between June 22nd and July 3rd, 1911; that nothing further was done with reference to putting the carbonating system into operation until some time during March 1912, when defendant installed two new pressure tanks. In the meantime, however, it appeared that the pipe-racking cooler and pump, which were furnished as part of the carbonating system, had been in continuous use from the time the carbonating system was delivered and installed in June 1911; it appearing that use could be made of this pump and cooler, independently of the carbonating system, and for a purpose different from that originally intended, i. e. in connection with the carbonating system.

It further appeared from the plaintiff's evidence that on or about April 6, 1912, Mr. August C. Magnus, president of the plaintiff company, went to the defendant company and talked with Mr. Rudolph Lederer and Mr. Samuel Lederer, president and secretary respectively, of the defendant company, and asked for payment on the contract, stating that he was tired of being put off with promises to replace the casks and that he believed they were endeavoring to evade payment; that he was then told that defendant did not want the machinery, and when he asked why, was told that it was no good and that they wanted him to take it out; that Magnus then said he did not see how they could pass judgment upon the machinery when they had never tried it, and stated that unless the account was paid, suit

would be instituted.

It further appeared on behalf of the plaintiff, that Johnson, at the request of the defendant, again went to its place of business on April 16th, and met the brewmaster, Krenn, who said, "We have fixed up the tanks now. We have got new tubs ;" to which he (Johnson) replied, "That is good. I will connect them up;" that he then went down stairs to look at the compressor, and found it standing in the cellar, in a damp place; that after examining it he connected it, and it seemed to work all right; that he then went upstairs, where he found gas raising fairly well in the new tubs, but when he returned downstairs to the compressor, he smelt gas; that in searching for the leak he took a lighted candle, and, holding it back of the compressor, it was blown out by the escaping gas; that he at once left and reported this to the plaintiff; that he then returned to the defendant's place of business and stated to Mr. Krenn that plaintiff would have a man come down that day to look at the machinery, but that Krenn said, "Johnson, it is no use;" that when he asked why, Krenn stated, "Well, I got orders from the office to stop you;" and that Krenn stated further, "You can do no more, there is nothing to do any more."

John J. Kef, a mechanical engineer, graduate of Cornell University and employed by the National Brake & Electric Company of Milwaukee, which company manufactured and sold to plaintiff the air compressor and water tank that went with the Cubler system, testified that during April, 1912 he went to the place of busi-

ness of the defendant company, told them who he was and his mission, viz., to examine the compressor; that he asked for the brewmaster and, while waiting for him, examined it; that when the brewmaster came he asked him who he was, and upon learning that Nef had come to examine the carbonating system, said, "It is no use to examine the pump at all;" whereupon Nef stated, "The Magnus Company have requested me to come here and make a report;" to which Krenn replied, "Oh, no, it isn't necessary." Nef further testified that he again examined the compressor during September of the same year. He then went into a detailed description as to the manner in which the compressor was constructed. He also stated that leaving the compressor for several months in a damp cellar without keeping the machinery properly lubricated, would so affect the various constituent parts thereof as to result in the escape of gas from the two vent holes in the back of the compressor; and that it was the gas from these vent holes that blew out the candle flame. Nef further testified that by properly cleaning the condenser and its various parts, and sufficiently lubricating it, there would be no escape of gas, but the compressor would be in perfect condition and competent to do the work expected of it in the carbonating system. Both Nef and Johnson stated positively that there was no crack of any kind or defect appearing on the outside of the compressor.

On behalf of the defendant, the witnesses, Heiser, Logue and Gosser testified as to the occurrence about the candle being extinguished at the time Johnson was searching for the gas leak in the compressor when he returned during April, 1912 to connect the carbonator with the new tanks.

This was the substance of their entire testimony.

The evidence of Krenn, defendant's brewmaster, was given in the form of a deposition. He testified as to what occurred from the time of the delivery of the machine and its first installation, to the time during April when Johnson returned after being notified that the new vats had been installed by defendant, and it was in accord with the testimony given by Johnson. Krenn further testified that at the time the test was made to locate the gas leak, he discovered a crack in the compressor which could be seen only partially because of the closeness of the compressor to the wall; that Nef stated that the crack was caused by a defect in the casting. He did not in any way contradict the statements of Nef and Johnson as to his refusal to allow them to do anything further at the plant with reference to installing the system after the new pressure tanks had been furnished.

The witness, Samuel Lederer, on behalf of the defendant, stated that during March, 1912, the engineer of the defendant company had made a test of the compressor and found that gas was leaking therefrom; he further testified that the machine had never been in satisfactory and successful operation while in defendant's plant. He admitted that during April he told Mr. Magnus to take it out.

Another witness on behalf of the defendant testified that during April he telephoned plaintiff company to come and take the machine out.

Defendant also introduced in evidence a letter under date of April 20, 1912, which is as follows:

"Messrs. A. Magnus Sons Co.,
Chicago, Illinois.
Gentlemen:

On last Thursday and Friday the expert mechanic was here to install and put in working order the carbonating system left at our plant last year, as we understand and according to our agreement for the purchase of same, he was to put same in good working condition and instruct our Brewmaster regarding the working of same, but he evidently can do nothing with same, and as the season is now so far advanced, we ask your disposition of same.

Kindly take the proper steps, and have same removed from our plant as soon as possible.

Thanking you, we remain,

Yours truly,

ATLANTIC BREWING COMPANY,

(signed) Rudolph Lederer, President."

On this state of the record, the jury having been instructed on behalf of both plaintiff and defendant, returned the verdict upon which the judgment herein complained of was entered.

Defendant, in urging a reversal, contends that plaintiff failed to show by its testimony that it had complied with the provisions of the contract; that therefore the court should have instructed the jury to find for the defendant. Defendant also assigns as additional reasons for a reversal, errors on the part of the court in rulings on the evidence, in statements made by the court during the trial, and the giving of certain instructions on behalf of the plaintiff and the refusing of others offered on behalf of the defendant.

An examination of the record shows but little conflict in the testimony. The amount due on open account was admitted, as was also the fact that when the machine was

first installed the defendant's pressure tanks were inadequate for use in connection with the carbonating system; and that from June, 1911 until April, 1912, (when the new pressure tanks were installed), no opportunity was given plaintiff to place the system in operation. There is no issue upon the fact that during the interim the compressor was kept in the basement of defendant's plant, which was damp and cold. There is no controversy on the question that when Johnson returned to install the system after the new tanks had been installed, there was a gas leak.

The point of difference in the testimony is as to what caused the gas leak. On this point, as to evidence directly bearing on the contentions of the respective parties, defendant has only the testimony of its brewmaster to support it, while plaintiff has the testimony of two witnesses, viz., Nef and Johnson, who, in addition, denied that there was any crack in the compressor.

There is no issue on the fact that during April, 1912, defendant refused plaintiff any further opportunity to install this system, but ordered it taken out, both by verbal command and in writing, as evidenced by its letter of April 20th. While the president of the defendant company testified that upon a test being made of the system by defendant's engineer gas was found to be escaping, Krenn, defendant's brewmaster, did not testify to any such test, and stated clearly that no effort was made to connect the compressor from June, 1911, when Johnson first endeavored to do so, until he returned the following April, after the new pressure tanks had been supplied.

There is no denial of the fact in this case, that during the time from June to April, the pump and cooler, which were a part of the carbonating system and set forth in the contract, were in fact used by the defendant company. It is not contended that they were used for a test in order to ascertain if it was satisfactory, nor is it denied that they were used in connection with the business of the defendant company.

As we view the record, the jury could well have found that there was no crack in the compressor but that the escape of gas was accounted for on the basis presented in the testimony offered on behalf of the plaintiff; that it had complied with the provisions of the contract to furnish an expert to install the carbonating system and to instruct defendant's brewmaster in its use; and that the defendant, by its acts, had prevented plaintiff from installing the system so as to allow a trial for sixty days to demonstrate whether or not the system was satisfactory for the service for which it was intended.

While some of the instructions given may have been inaccurate, and perhaps some given on behalf of the plaintiff and the defendant inconsistent with each other, yet under the facts and circumstances in this case, the jury could not have returned any other verdict than the one they did, and hence such instructions cannot be regarded as having misled the jury to the prejudice of the defendant.

Defendant also complains of errors on the part of the court in ruling on the evidence and in the making of improper statements during the trial, but we are of

the opinion that defendant's contentions in regard thereto are without substantial merit.

Finding no reversible error, the judgment will be affirmed.

AFFIRMED.

377 - 21364

JAMES ROSE, a minor, by CLARA BYLOW, his next friend, Appellee. vs. CHICAGO CITY RAILWAY COMPANY, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

199 I.A. 600

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

This is an action on the case, by appellee (plaintiff below), against appellant (defendant below), for injuries sustained as the result of having been struck by one of its cars. There were two trials. The first culminated in a disagreement of the jury. On the succeeding trial, the jury found the issues for the plaintiff, assessing his damages in the sum of $8,000; and from the judgment rendered thereon, defendant appeals.

While many errors have been assigned upon the record and practically all of them argued by the defendant, yet in the view we have arrived at, it will be necessary for us to discuss at length but one phase of the case, viz., whether or not the verdict of the jury is against the manifest weight of the evidence.

The accident in question occurred on November 19, 1911, about 7:30 P.M. (Sunday evening), on 35th street,

between Leavitt street and Irving avenue, in the City of Chicago. Plaintiff, then a boy of 14, was struck by an eastbound 35th street car.

Thirty-fifth street runs east and west; Irving avenue and Leavitt street, north and south. Leavitt street intersects 35th street at right angles, and is one block east of Irving avenue, the latter terminating at the north side of 35th street. Archer avenue runs in a northeasterly and southwesterly direction, and crosses 35th street a short block east of Leavitt. About midway between Leavitt street and Archer avenue, 35th street is traversed by the viaduct of the Chicago & Alton Railroad. At this point, there is a lowering in the street level, forming a subway, to enable cars and other vehicles to pass under the railroad tracks. The west incline of this subway is approximately 100 feet east of Leavitt street, and the east incline, a slightly greater distance from Archer avenue. Otherwise 35th street is uniformly level, and the view unobstructed, for a considerable distance east and west of the viaduct.

Defendant's street car tracks occupied the center of the highway on 35th street; its westbound cars using the north track, and its eastbound cars the south track. Between the nearest rail and the curbing on each side of the street, there ~~is~~ was a space approximately twelve feet wide.

Plaintiff lived on Western boulevard, near 35th street. On the evening in question, he, in company with Sheridan N. Christensen, his chum, whose home was near plaintiff's, walked east along 35th street to Archer avenue,- a distance of about five blocks. At Archer avenue and 35th street, plaintiff and Christensen tarried for a short time, and after stopping in an ice cream parlor nearby for refresh-

ment, they started back west in the direction of their home. A light snow was falling at the time.

According to plaintiff's version, the two boys started back west on the south side of 35th street, and stopped at the Chicago & Alton elevation east of Leavitt street to slide down the embankment, which was covered with a thin sheet of snow. This embankment was of cement and formed the west abutment supporting the viaduct over which the trains passed. After indulging in this pastime for a short period, plaintiff started west on the south side of 35th street, Christensen remaining to take a few more slides. Shortly afterwards, Christensen also abandoned the slide and walked west on the south side of 35th street, to Leavitt, where he crossed to the north side of 35th street, behind a westbound car that had just passed him. Plaintiff continued on the south side of 35th street, until he had reached a point about midway between Leavitt street and Irving avenue, when he turned north to cross the street, to join his companion who was attempting to hide from him. In doing so, he looked to the west, but saw no car approaching. He then looked to the east and saw a car coming up the incline. Plaintiff then stepped into the street, about six feet from the south curb, where he remained until the westbound car was within a short distance of him, i. e. approximately 20 or 30 feet, when he stepped upon the eastbound track. He then looked again to the west, but saw no car approaching. After the westbound car had almost passed him and he was ready to cross behind to the north side of 35th street, an eastbound car came along and struck him.

Defendant introduced testimony which showed that plaintiff and Christensen boarded the rear platform of a westbound 35th street car after it had passed Archer avenue, for the purpose of stealing a ride; that Christensen stood on the north step, on the open side, and plaintiff stood on the south step, on the "blind" or closed side. The conductor was inside the car, collecting fares at the time; that as the car proceeded westward the two boys remained in their respective places until the conductor started back to the rear platform; that Christensen, who saw the conductor coming, jumped from his place and called to the plaintiff, who then leaped from his position on the blind side of the rear platform, into the south track, in the path of an eastbound car which was then about ten or fifteen feet away.

~~An examination of the testimony shows that~~ Plaintiff was the only witness in his own behalf, in support of his contention as to where he was just before he was struck. In fact, no witness testified as to his leaving the south walk of 35th street to cross over to the north side of the track, about midway between Irving avenue and Leavitt street, save himself. There were two other witnesses besides him, viz., one Yeuk, and Sheridan Christensen, his companion, who started out with plaintiff that evening.

Christensen testified that he saw plaintiff walking along the south side of 35th street, west of Leavitt street when he (Christensen) crossed in the rear of a westbound car at about Leavitt street, to get on the north side of the street; that he did not see plaintiff again until after the accident, when he observed him lying on the pavement near the south curb of 35th street; that at the time of the acci-

dent, he was running parallel with the westbound car, on the north sidewalk of 35th street, so as to hide from the plaintiff, and was not stealing a ride on the car. ~~He also testified that the eastbound car was traveling at a high rate of speed (25 to 30 miles per hour) and that it ran along for a distance of about 250 feet after the accident.~~

Youk, the other witness for the plaintiff, testified that he was walking west on the north side of 35th street; that when about 100 feet west of Leavitt street, he was attracted to the accident by the noise of the crash; that he saw plaintiff "rolling alongside of the curb," on the south side of 35th street, midway between Leavitt street and Irving avenue. He also stated that he did not see any boy running along on the sidewalk on the north side of 35th street; and that he saw the west bound car, but did not pay any particular attention to it; ~~that the eastbound car was running at a high rate of speed (25 to 30 miles per hour), and that it stopped~~ the westbound car stopped about 250 feet from the scene of the accident.

On behalf of the defendant there were four witnesses who saw the accident and testified as to how it happened. Wm. Yegaard, motorman of the eastbound car, stated ~~that at the time of the accident, his car was running at the rate of 12 to 13 miles per hour;~~ that he did not see plaintiff until he was within 15 feet of the rear end of the westbound car, when he noticed plaintiff jump from the step on the blind side of the westbound car and run across the eastbound track; that he yelled at him, sounded the gong, applied the brakes, and that though he did everything in his power to stop the car, it was impossible to avoid striking the boy.

Otto A. Beckman, a passenger on the front platform of the eastbound car, testified that his attention was drawn to the accident by the cries of the motorman, followed by the sudden application of the brakes; that he then noticed the plaintiff running southwestwardly across the eastbound track; that almost instantly thereafter he was struck by the car.

The witness, Herman Rehder, who was riding on the rear platform of the westbound car, testified that he saw plaintiff and Christensen on the car near Leavitt street, Christensen being on the open side, and plaintiff on the blind side of the westbound car; that the conductor was inside collecting fares; that as the conductor came towards the rear door, Christensen called to the plaintiff and jumped from the car; that Christensen again yelled, after which the plaintiff dropped from the other side, which action was immediately followed by the crash and commotion caused by plaintiff's being struck by the eastbound car.

The witness Frank Coleman was on his way to church, walking east on the south sidewalk of 35th street. He testified that at the time of the accident, a westbound car had just passed when he saw plaintiff "moving pretty fast" toward him, i. e. toward the south sidewalk, from the space between the eastbound and the westbound tracks,- and "almost instantly after the car had gone west the eastbound car was coming along," and as he (the plaintiff) was running south and was almost across the eastbound track, he was struck by the eastbound car and thrown to the south curb.

~~In addition to Mr. Yegaard, the motorman, testav-~~

Lanz, the conductor of the eastbound car, and Beckman, testified that the speed ~~xxxxxxxxxxxx~~ of the eastbound car prior to and at the time of the accident was about 18 miles per hour. Coleman testified it was going along at ordinary speed. ~~All of these~~ Three witnesses testified that the car traveled about 125 feet after the accident.

It was admitted that the accident occurred about 7:30 P.M. The evidence clearly showed that the lights in the eastbound car were lighted and that the headlight was burning.

An examination of the testimony given by the eye-witnesses for the defendant shows that they were all in a position to see the accident. They were in no way contradicted, save by the testimony of the plaintiff, with reference to where he was at the time of the accident. In fact, the testimony of Yeuk is not inconsistent with the defendant's version as to how the accident occurred. There was a variance in the testimony with reference to the speed of the eastbound car, and the place where it came to a half after the accident. There was also a denial by Christensen that he was stealing a ride on the westbound car.

An attempt was made to impeach the testimony of Frank Coleman, by evidence that Coleman had, in statements made before the trial in the presence of plaintiff's relatives, said that he saw plaintiff step from the south sidewalk of 35th street and had nearly gotten across the eastbound track when he was struck. However, such statements are inconsistent with the admitted fact that plaintiff was thrown to the south curb, whereas if the statements alleged to have been made by Coleman were true, then after being

struck, plaintiff would have been hurled to the north of the track, and not to the south, close to the south curb, where he was found after the accident.

Plaintiff had the burden of showing that he was in the exercise of ordinary care for his own safety at the time and place in question. ~~In endeavoring to give this proof, he testified, as set forth in the statement of facts by plaintiff's counsel,~~ Plaintiff testified that he looked to the west at least three times before he was struck, the last time being when the westbound car had almost passed him, and yet he did not see the eastbound car, although he testified that at the time, even with snow falling, he could see to the west for a distance of not quite a block and a half. It ~~is~~ was conceded that the ordinary block ~~is~~ was about 250 to 300 feet long. ~~It is sought to be shown on behalf of the plaintiff, that the speed of the eastbound car was from 25 to 30 miles per hour. There~~ was a conflict in the evidence as to the speed of the eastbound car. Defendant's testimony was to the effect that the car was running at a rate of 10 to 12 miles per hour. However, conceding it to have been 30 miles per hour at the time of the injury, the eastbound car must have been within plaintiff's plain sight the last time he claims to have looked to the west. Both these cars, were, according to the ~~evidence about 30 feet long.~~ When plaintiff looked west for the last time the westbound car was within about 30 feet of him. Plaintiff claims to have been struck by

The testimony was conflicting as to the speed of the eastbound car, plaintiff's witnesses being that it was about 25 to 30 miles per hour and defendant's that it was from 10 to 12 miles per hour.

attack, plaintiff would have been buried in the debris of the house, unless it did not matter, since in the world, there is no world cup, where he was found after the incident.

Plaintiff had the burden of showing that he was in the exercise of reasonable care for his own safety at the time and place in question. In determining the time place, or position, it has been held by the Nigerian Court of Appeal, that plaintiff's evidence, that he was looking to the west at about three times before he was struck, the last time being when the vehicle was about passed him, and yet he did not see the vehicle coming, although he testified that at the time, when it came falling, he would see to the west for a distance of not quite a block and a half. It is conceded that the vehicle that he alleged ran a distance of 50 to 60 feet long, it is not reasonable to be aware of the probability, that the speed of the vehicle was from 40 to 50 miles per hour, there was a condition in the evidence on the ground of the accident. Defendant's testimony was to the effect that the car was running at a rate of 12 to 20 miles per hour. However, considering it to have been 20 miles per hour at the time of the injury, the evidence was such as to make plaintiff's claim right for back blow or crushed to have injured in the car. Pain there was, more, considering the evidence which he testified. The plaintiff testified was for the back that the minimum was one week, about 50 feet of him. Plaintiff claimed he was knocked to

the eastbound car when the westbound car had almost passed him. The distance covered by the westbound car, from the last time he looked to the west to the time when he was struck, was, ~~therefore~~, about 50 feet. The evidence showed that the westbound car was going at the rate of 10 or 12 miles per hour, and this was not questioned. Therefore, if the eastbound car was going at the rate of 30 miles per hour, or about three times as fast as the westbound car, it could not have been more than 150 feet from the plaintiff the last time he looked, and was clearly within the line of his vision, as according to plaintiff's own testimony, he could see to the west for a distance of not quite a block and a half, or nearly twice the distance between him and the eastbound car when he stepped into the track. Moreover, the evidence shows, and ~~it~~ was admitted by counsel in his brief, that, under the very same conditions, plaintiff saw a car coming up the incline under the Chicago & Alton viaduct, which, under the evidence, was at a distance of more than 200 feet. There can be no escape from the conclusion that if plaintiff had looked, he must have seen the eastbound car. The record clearly shows that there was nothing to prevent his seeing the car coming from the west. His view was unobstructed. The mere fact that he states that he looked and did not see the eastbound car, even though uncontradicted, does not make it worthy of belief. It has been held in numerous cases, that the testimony of an interested witness as to facts inherently improbable, need not be accepted by a court or jury, although such testimony is not contradicted by any other direct testimony in the case, and although the witness is not otherwise impeached. In passing upon this same question, Mr. Justice Adams, said in C. & E. I. R. R. Co. v. Kirby, 86 Ill. App. 57, 59:

"Assuming, therefore, his testimony to be true, that he looked north just before stepping on the freight track, that the evening was clear and bright, which fully appears from the evidence, and that appellee's eyesight was good, as he says it was, it is a physical impossibility that he did not see the train. The only alternative to this is, that his testimony is untrue; that he did not look. The testimony of the witness to that which is physically impossible, must be rejected as not in accordance with the truth of the matter, even though uncontradicted by the direct testimony of any other witness." (Citing authorities.)

After a careful review of the evidence, we are of the opinion that the verdict of the jury is clearly and manifestly against the weight of the evidence.

Defendant also complains of the rulings of the court in the giving of certain instructions offered on behalf of the plaintiff, and in the refusal of others offered on behalfof the defendant. While we are of the opinion that some of the instructions given on behalf of the plaintiff were not strictly accurate, and that some of the instructions offered on behalf of the defendant and refused by the court might properly have been given, yet we believe that the jury were fairly instructed as to the law applicable to the case.

Defendant further complains of the ruling of the court in not permitting counsel for defendant to state what he believed the law to be and base arguments thereon. An examination of therecord shows that counsel for defendant endeavored to avail himself of that privilege but the court denied him that right, and in this the court erred. Yeoke v. City of Chicago, 208 Ill. 192.

Complaint is also made of certain statements made by counsel for plaintiff in his closing argument before

the jury. We do not think they were proper, but on a new trial, they, doubtless, will not be repeated.

For the foregoing reasons, the judgment of the Circuit Court of Cook County will be reversed and the cause remanded.

REVERSED AND REMANDED.

110 - 22090

SIDNEY C. EASTMAN, Trustee under the last will and testament of James H. Dole, Deceased,

Complainant,

vs.

GEORGE S. DOLE, CHARLES E. DOLE, FRANCES F. DOLE LEMAN et al.,

Defendants.

FRANCES F. DOLE LEMAN,

Intervening Petitioner,

vs.

SIDNEY C. EASTMAN, Trustee etc.,

Respondent.

- - -

An appeal of SIDNEY C. EASTMAN, Trustee etc.,

Appellant.

APPEAL FROM CIRCUIT COURT COOK COUNTY

199 I.A. 601

MR. PRESIDING JUSTICE FAM delivered the opinion of the court.

Sidney C. Eastman, the appellant herein, who was trustee under the will of James H. Dole, deceased, filed a bill wherein he sought to be relieved of his duties as such. While the cause was pending, Frances F. Dole Leman, one of the beneficiaries under the trust created by this will, filed an intervening petition to compel appellant to pay to her the share of the income of the trust to which she was entitled under the will. Upon a hearing, the court entered an order directing appellant, as trustee, to pay the petitioner $5,000. And from this order an appeal has been prayed.

A motion was made to dismiss the appeal, for the reason that the order sought to be reviewed ~~is~~ was an interlocutory one, and that therefore the court ~~is~~ was without jurisdiction.

It is the well established rule, that "There must be a final order or decree in a chancery suit, or a final judgment in an action at law, to justify an appeal or writ of error." (Bailey v. Conrad, 271 Ill. 294). In said case it is further held that a final judgment is "one that finally disposes of the rights of the parties, either upon the entire controversy or upon some definite and separate branch thereof." To the same effect are, Parson et al v. Gorham, 117 Ill. 137, and Rosenthal v. Board of Education, 141 Ill. App. 134, id. 239 Ill. 29.

The question presented to us on this motion is, whether or not the order entered disposes of the rights of the parties, either upon the entire controversy, or ~~any definite and separate branch thereof.~~ The order in question, after setting forth the parties, provides as follows:

> "It is ordered that Sidney C. Eastman, as such trustee, etc., pay to solicitor for said Frances E. Dole Leman, from the funds of said trust estate in his hands as such trustee, etc., the sum of Five Thousand Dollars ($5,000) upon said Frances E. Dole Leman giving a bond in the sum of Five Thousand Dollars ($5,000) with surety, to be approved by the court, to said Sidney C. Eastman, trustee, etc., to refund said Five Thousand Dollars ($5,000) or any portion thereof to said Sidney C. Eastman, trustee, etc., or to his successor in the trust, or as may be ordered by the court, in the event that it shall be determined at any time hereafter by order of court that said Five Thousand Dollars ($5,000) or any portion thereof shall not belong to or be due to said Frances E. Dole Leman in the adjustment of all the rights and equities between said Frances E. Dole Leman, Sidney C. Eastman, as such trustee, etc., George H. Dole and Julia D. Hurlbut, said payment to

be without prejudice to and subject to any and all claims of said Sidney C. Eastman, as such trustee, etc., and of any and all other parties to said cause and to the rights of all parties to said cause.

"The bond of said Frances E. Dole Leman, with Henry W. Leman, as surety, for Five Thousand Dollars ($5,000) is now presented in open court and is hereby approved and ordered filed in said cause."

A reading of this order, tested by the principles of law enunciated in the cases heretofore cited, shows clearly that by its own terms it is not a final one, but is conditional, for it provides for the payment of $5,000 by the appellant to the intervening petitioner, conditioned upon the intervening petitioner's furnishing a bond in a like amount, in the event that it shall be determined by the court at any time thereafter, that the said $5,000 or any portion thereof, shall not belong to or be due to the intervening petitioner, in the adjustment of all the rights and equities between the parties to the action. By this order, the court still had the right to review, reverse or modify the same, and reserved to itself the power to direct its re-payment in case it was found that the petitioner was not entitled to the money. Manifestly, this order lacks the element of finality and is but interlocutory, and the motion to dismiss the appeal, therefore, must be allowed.

A reading of the opinion in People ex rel. v. Prendergast, 117 Ill. 588, cited by appellant, shows that in that case there was a final disposition of the rights of the parties upon a definite and separate branch thereof, which is not the situation in the case at bar.

We have also examined the other authorities cited by appellant, but are of the opinion that they are not applicable to the facts in the case at bar.

The contention of appellant, that the right to make this motion to dismiss the appeal has been waived by joinder in error, is without merit; first, as it is a question of jurisdiction which cannot be conferred by stipulation, consent or joinder in error, and second, because the motion to dismiss the appeal was made in the brief filed, and preliminary to the argument on the merits of the controversy.

APPEAL DISMISSED.

304 - 21288.

POLISH NATIONAL ALLIANCE OF THE U. S. A., Appellant,	APPEAL FROM
vs.	CIRCUIT COURT,
HENRY PAUROWICZ, et al. Appellees.	COOK COUNTY.

199 I.A. 604

MR. JUSTICE GOODWIN delivered the opinion of the court.

Appellant filed its bill in the court below to foreclose two mortgages on a certain piece of real estate; one made to secure a loan of $1,500, and the other an additional advance of $250. The chancellor held that the second mortgage was invalid and unenforcible because made in contravention of sections 272A and 272B of chapter 73 of the Revised Statutes. Section 272A provides, in substance, that it shall be lawful for any fraternal beneficiary society to invest its funds in certain securities, including "mortgages (being first liens) on real estate," etc., while the following section provides that it shall be unlawful to invest in any securities except as in the former section provided, and that no securities not in accordance with the provisions of the act shall be deposited or registered under its provisions. Counsel for appellant, however, contend that the mortgage to secure the additional loan was within the permission of the statute, since its effect was merely to increase the size of the mortgage indebtedness. Clearly, the appellant could have released the property from the first mortgage and taken a new trust deed to secure the entire indebted-

ness, without contravening the provisions of the statute. The difference between such a transaction and the one in question is merely a difference in form, and not in substance. There therefore seems to be force in appellant's contention that the transaction in question resulted in the ownership of a mortgage indebtedness which was a first lien on the real estate, and therefore a permissible investment within the meaning of the statute. Counsel further contend that the transaction, even if it went beyond the permission of the statute, did not render the trust deed given to secure the additional indebtedness incapable of enforcement. They cite Kadish v. G. C.R. L. & B. Assn., 151 Ill. 531, as an authority for the proposition that in a case where the mortgagor has received the money and subsequently encumbrances have been made with notice of the lien, a plea of ultra vires will not, as a general rule, prevail. We have not had the assistance of any brief or argument on behalf of appellees, and are, therefore, obliged to rely largely upon the brief and abstract presented on behalf of appellant. From such an examination the position of the appellant appears to be sound, and we are, therefore, constrained to reverse the decree entered, and remand the cause with directions to enter a decree including the additional loan in the amount due appellant for which it is entitled to a first lien upon the premises in question.

REVERSED AND REMANDED
WITH DIRECTIONS.

323 - 21307.

ANNIE KITZ, Executrix of the Estate of Jacob Kitz, Deceased,

Appellee,

vs.

SCUDDER SYRUP COMPANY, A corporation,

Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

1991 I.A. 605

MR. JUSTICE GOODWIN delivered the opinion of the court.

This appeal is taken to reverse a judgment in favor of the appellee for $4,500, secured by appellee suing as executrix of the estate of her husband, for damages resulting from his death, which was alleged to have been caused by the negligence of the appellant.

It appears from the evidence that a servant of the ~~appellant~~ defendant took its delivery car from its place of business at 154 West Erie street, some time after business hours, picked up a Miss Lewis on La Salle avenue near the park, and, while driving west on Wellington street across Lincoln street, struck the Ford car which ~~appellee's~~ plaintiff's testate was driving.

As it is very clear that the appellant is not liable if the driver was not acting as the servant of the owner at the time of the accident the question of whether he was or was not so acting was a vital element in the case. The suit was originally brought against the ~~appellant~~ defendant and its driver, but at the close of plaintiff's case it was dismissed as to the latter on plain-

tiff's motion. Defendant called the driver to prove the facts and circumstances connected with the accident, and at the close of his testimony in chief, asked the following question: "Where were you going on that trip?" to which the driver responded, "Why, it was a brand new machine and I was out for a little advertisement; the boss always would say 'take it out.' It was a warm evening and I was taking a little spin." This witness testified further on cross-examination as follows: Q- "Where did you get that license, who furnished it?" A-"Scudder Syrup Company bought it for me. They thought it would be a good piece of advertising." Q- "When you say a good piece of advertising what do you mean by that?" A- "Well, Mr. Scudder would always talk about the machine standing in there, 'If you have any time,' he said, 'take it out and keep it out on the road. It is good advertising.' It was lettered up nicely advertising the Scudder Syrup Company. The car was brand new, in fine condition. If it was not, I would not have taken it out." Q- "That is what you were doing that night, for the purpose of advertising?" A-"Yes sir." Q- "At the request of Mr. Scudder?" A- "Yes."

Scudder was afterwards put on the stand with the evident purpose of denying this conversation, but as he was financially interested in the company, the court excluded his testimony. It is clear that under the second section of our statute in regard to evidence and depositions in civil cases, the testimony offered was not competent unless it came within the 4th exception to the section, which permits an interested party to testify "Where in any such action, suit or proceeding, any witness, not

a party to the record, or not a party in interest, or not an agent of such deceased person, shall, in behalf of any party to such action, suit or proceeding, testify to any conversation or admission by any adverse party or party in interest, occurring before the death and in the absence of such deceased person, such adverse party or party in interest may also testify as to the same admission or conversation."

If, then, the driver had been called as a witness for the appellee, and had testified as he did in regard to alleged conversations with Scudder, the latter's testimony in regard to such conversations would, under the exception noted, have been admissible. In Stevens v. Brown, 12 Ill. App. 619, it has been also held that where the person suing as executor of a deceased person brings out on cross-examination testimony in regard to a conversation with a party in interest, the latter may be called to contradict it. The court there say, p. 623:

> "It is true the plaintiffs were suing as the executors of a deceased person, and the defendant therefore, was not a competent witness in his own behalf, unless he was brought within some one of the exceptions contained in the second section of the statute, in relation to evidence and depositions. It is there provided, in substance, that where a witness shall testify on behalf of a person suing as executor, etc., of a deceased person, to any admission or conversation by any adverse party or party in interest, occurring before the death of such deceased person, and in his absence, such adverse party or party in interest may also testify as to the same admission or conversation.
>
> "In whose behalf, then, must the witness be deemed to have testified to said conversation with the defendant? The conversation was not called out by the defendant, nor was any foundation laid by the defendant in his examination of the witness in chief, for calling it out on cross-examination. It was given in response to questions improperly put to the witness by the plaintiff's counsel. The plaintiffs must be deemed, therefore, to have made the witness

> their own to this extent, and in testifying to said conversation, he must be regarded as having testified on behalf of the plaintiffs."

In Richerson v. Sternburg, Admx., 85 Ill. 272, the court held that the party in interest could not be called to contradict the testimony of his own witness to a conversation which he had had with him even though the administratrix had called the witness for further cross-examination in regard to the same matter. The vital question here, therefore, is as to whether the driver, in testifying as to the alleged conversation, was a witness for the appellant or for the appellee. If the testimony was brought out by the appellant, then very clearly, under the ruling in the case of Richerson v. Sternburg, supra, Scudder was not a competent witness to contradict it, even though it was amplified thereafter on cross-examination. The question, then, turns upon whether the driver, in testifying to the conversation, did so in behalf of the executrix within the meaning of the statute. In determining this question, the language of the statute is not to be given any technical or literal interpretation, for our Supreme Court has said, in Whitmer v. Hucker, 71 Ill. 410, that the statute has a spirit which extends beyond the letter, and this court has said, in Butz v. Schwartz, 32 Ill. App. 156, that the courts have always endeavored to construe the statute according to its spirit, and not merely according to its letter. The statement made in reply to the question put to the witness on behalf of the appellant on direct-examination was not, so far as it related to anything said by Scudder, responsive, and was, in effect, a statement volunteered by the witness. The statements made by the witness on cross-examination were not made

that just is life, motion, and is beautiful,
in such manifestations, he said he regarded as
having "validity on behalf of the Infinite".

In Hindemith's Lehrstücke, Lehre, in 1929, the music held such the quality in intervals which by making to emphasized the beginning of his pre-lessons in a correspondence which is had and with the music through the administration and making the "Lehrer" (music-teacher) an regard to the same matter. The first Lehrstücke were, therefore, to be a method for players, as familiarizing use in the diligent preparation, and a method of the diligent and of for the audition. If the beginning was begun and by the audition, then very slowly, under the rubric of the work of Lehrstücke, Lehre, whether the well a composer relieves is mentioned in, then finally it was multiple involvers in experimentations. The question, then, large gain reaches the listener, in reality dig to the experiences, and so in regard of the composition which the meaning of the rubric. In connecting the musicians, the language of the rubrics is not to be taken any beginning or finished instrumentation, for our purpose which was said, in Lehrer Zu Lehrer, of 1929, and the studies has a music and to unknown begin the listen, and with music has made. In Lehrer Zu Lehrer, of 1929, also 1929, that has music been relieves experiment in musical the studies connecting to the rubric, and not merely immediately to the listeners. The experiment made in music, it was musician put to the listeners on behalf of the experiment on disappointment in the music, or that as related to this taking part to "Lehrer, Lehrerin", and now, in which, a musician relieves to the experiment. The "experiment" made of the rubrics in experimentation and the music

competent by this statement volunteered on direct-examination, for, on the contrary, every fact and circumstance connected with the trip in question was a proper subject for cross-examination, in the absence of any such statement as the one volunteered on direct-examination. In these circumstances, it is impossible for us to say that the testimony of the witness in regard to his conversations with Mr. Scudder - both the statement volunteered on direct-examination and those brought out on cross-examination - did not constitute testimony of a witness in behalf of the executrix within the literal meaning of the statute, and much less are we able to say that it was not in her behalf within its spirit. We are, therefore, clearly of the opinion that the case falls within the 4th exception to the second section of the act, and that Scudder, although a party in interest, was a competent witness to testify as to the alleged conversation. Moreover, in view of the fact that from a careful examination of the record it is open to grave question whether the witness was, at the time of the accident, on the business of appellant, the ends of justice certainly require that appellant should not, through any statement volunteered by that witness, be cut off from introducing what would otherwise be competent evidence.

There is nothing in the contention of appellee that appellant had no right to impeach the testimony of his own witness, for while a party may not discredit his own witness by general evidence, he is not precluded from putting in evidence contrary to the testimony of one of his own witnesses even though the incidental effect of such testimony is to impeach or discredit a witness already examined in his behalf. (Rockwood v. Foundstone, 38 Ill.199.)

The judgment is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

323 - 21307.

ANNIE KITZ, Executrix of the Estate of JACOB KITZ, Deceased,
Appellee,

vs.

SCUDDER SYRUP COMPANY, A Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

ADDITIONAL OPINION FILED ON PETITION FOR REHEARING. 1914. 605

MR. JUSTICE GOODWIN delivered the opinion of the court.

Counsel for appellee, in their petition for a rehearing, have urged with great earnestness that it nowhere affirmatively appears in the record that the witness Scudder was offered as a witness to disprove the alleged conversation with the witness Abrams, and that in the absence of a statement as to the purpose for which he was offered, it was not error for the court to exclude his testimony. There is no little force in this suggestion. Every inference to be drawn from the record, however, indicates that Scudder was put on the stand for the purpose of contradicting the alleged conversation, and that, therefore, competent evidence was, in fact, excluded, though apparently through no fault of the court. The record, moreover, discloses a case which turned upon the question of whether the witness Abrams was using the automobile truck in question on the master's business. The evidence on this point was of such a character that the trial judge, as the bill of exceptions shows, expressed grave doubt as to its probability, and upon a careful examination we are of the opinion that the verdict was, on this point, contrary to the manifest weight of the evidence. In this state of the record, the ends of justice require that there should be a new trial.

REHEARING DENIED.

835 - 21320.

LOUIS WEINBERGER,
Appellee,

vs.

AMERICAN WIRE & COMPANY,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

1991 I.A. 608

MR. JUSTICE GOODWIN delivered the opinion of the court.

Appellant seeks to have reversed a judgment against it for $300 for personal injuries. ~~The record shows the~~ While appellee was standing at the step of a Clark street, south-bound, pay-as-you-enter car, at the southwest corner of Clark and Washington streets, which was then the terminal of the line, waiting for the conductor to let him aboard, the left rear wheel of a one-horse wagon belonging to ~~appellant~~ defendant ran over his heel. ~~Appellant seeks to have the judgment reversed upon the ground that there was no evidence of negligence on the part of the driver, and upon the further ground that appellee was guilty of contributory negligence.~~ ~~Appellee~~ Plaintiff, at the time of the accident, was facing and about to board the car in question. He was fully within his legal rights, and the evidence fully justifies the conclusion that he was in the exercise of ordinary care for his own safety. Appellant's driver could not be located, but from the evidence offered, there appears to have been nothing to prevent him from seeing appellee in time to avoid striking him. In view of this fact, it is impossible to say that driving so close to appellee as actually to strike him was not sufficient in itself to sustain a finding that the driver was negligent.

Counsel lay great stress upon the fact that the wagon was being driven straight south, and that the front wheel had passed the appellee without injuring him. It may be remarked that the rear wheels ordinarily project beyond the line of the front wheels, and that the slightest turning of the latter after they had passed appellee might well have been sufficient to bring the wheels in contact with him, even if the front and rear axles had been of the same length.

In view of the facts disclosed by the record, it is impossible for us to say that the verdict was contrary to the manifest weight of the evidence on either point raised.

AFFIRMED.

456 - 22413.

1745

AL. V. BOOTH, doing business as AL. V. BOOTH AND COMPANY, Appellee.	APPEAL FROM
vs.	CIRCUIT COURT,
R. W. HARTWIG, Appellant.	COOK COUNTY.

199 I.A. 609

MR. JUSTICE GOODWIN delivered the opinion of the court on motion to dismiss appeal.

Appellee has filed a motion to dismiss the appeal on the ground that the appeal bond was not filed within the term at which the final decree appealed from was entered, nor within the time fixed for the filing thereof, and that no extension of the time allowed for the filing of the bond was made within the term or within the time originally allowed.

~~The record discloses that the~~ Final judgment in this cause was entered October 26, 1915; ~~and~~ an appeal was prayed and allowed, conditioned upon the filing of an appeal bond within thirty days from that date; ~~consequently, the time for filing this bond expired Thursday, November 25, 1915.~~ No bond was, ~~however,~~ filed within the time fixed, nor was any order entered attempting to extend the time, until November 26. As the time allowed for the filing of the bond had expired without any extension of the time during the term, or within the time originally allowed, the court lost jurisdiction to extend the time. (Gorski v. John Featherstone's Sons, 53 Ill. App. 368; Fardridge v. Morgenthau, 157 Ill. 395.) It is, therefore, necessary to allow appellee's motion to dismiss the appeal.

APPEAL DISMISSED.

240 - 21221.

FORT & LESTER COMPANY, a corporation, Defendant in Error,	ERROR TO MUNICIPAL COURT OF CHICAGO.
vs.	
CHICAGO FLEXIBLE SHAFT COMPANY, a corporation, Plaintiff in Error.	

199 I.A. 637

MR. JUSTICE O'CONNOR delivered the opinion of the court.

This was an action of the 4th class in the Municipal Court of Chicago, brought by the defendant in error (plaintiff) against the plaintiff in error (defendant) to recover for certain merchandise sold and delivered to the defendant by the plaintiff. To the statement of claim filed by the plaintiff, the defendant filed and affidavit of merits setting up its defense and a statement of set off which, on motion of plaintiff, was stricken from the files. Defendant subsequently, at different times, by leave of court, filed a second, third and fourth affidavit of merits and statement of set off and a fifth statement of set off, each of which was successively stricken from the files on motion of plaintiff. Afterwards, no further defense being made, judgment by default was entered in favor of plaintiff. To reverse this judgment, the defendant prosecutes this writ of error.

The defendant contends that the court erred in striking its fourth affidavit of merits and fifth statement of set off from the files, and in entering judgment

in favor of the plaintiff.

Plaintiff's statement of claim shows in tabulated form that the plaintiff sold to the defendant 7 different items of merchandise, consisting of brass tubing; that these different items were sold to the defendant on 5 different dates, the first being on June 19, 1911, and the last on August 19, 1911; that the price charged for the tubing was 6 cents per foot; that the total for the 7 items amounted to $1,675.86; that the defendant made a cash payment of $1,219.73 on September 14, 1911; that the balance due plaintiff from defendant was $456.13, with interest. The fourth affidavit of merits does not deny that the balance as stated in plaintiff's statement of claim is the correct amount. Defendant averred that plaintiff's statement of claim shows only a small portion of a running account, continuing from September 16, 1907, to May 21, 1912, but makes no attempt to set out the account in full. Certain payments are alleged to have been made by the defendant on November 21, 1911, and May 21, 1912, but there is no allegation that they were not properly credited or that those payments were made for any of the items for which the plaintiff seeks to recover. The defendant averred that certain goods of the value of $456.13 were returned to the plaintiff, on account of alleged defects, but there is no allegation that the plaintiff refused to accept these goods so returned or refused to give credit therefor; nor was there any allegation that the plaintiff was seeking to recover for the value of those goods. The defendant further stated that on a certain other occasion it returned other goods to the plaintiff and received a credit of $42.98, and that

it is a custom of the trade to return defective goods. There is nothing in defendant's affidavit of merits which shows that the plaintiff did not give the defendant proper credit for all the goods returned and for all the payments alleged to have been made. [We are clearly of the opinion that the defense as set up was wholly insufficient in law, and the court did not err in striking the same from the files.]

Defendant's fifth amended statement of set off claims $1,400.00 for loss and damage "sustained by this defendant by reason of the said defective brass tubing used in the manufacture of flexible shafts, and by reason of said brass tubing being defective the said flexible shafts so manufactured and sold by this defendant were defective and were returned to this defendant by its customers; that each of said flexible shafts so defective and returned to this defendant contained 50 inches or more of said defective brass tubing and that said brass tubing was sold to this defendant at the rate of 5 7/8 cents per foot and was charged to this defendant at said rate in said account above mentioned, a part of which account is set forth in the plaintiff's statement of claim; that a list of the number of said defective shafts, and the dates upon which they were returned to this defendant by its customers, is contained in the statement hereto attached". It is further alleged that defendant suffered loss and damage by reason of the expense of labor and other materials used in the manufacture of the defective shafts.

The list attached to defendant's statement of set off showed the date of return and the number of shafts

returned on each date, but there was no showing as to the amount of damages on each item; nor is there any showing as to how much of defendant's claim is made up of the expense of labor and other materials used in the manufacture of the shafts. We are wholly unable to tell from the statement of set off how the defendant arrived at the amount of its claim for $1,400.00. The statement of set off is too uncertain and indefinite. De Forrest v. Oder, 42 Ill. 500; Carrier-Low Co. v. Keys, 162 Ill. App. 311; Martin & Co. v. Roehm, 92 Ill. App. 87.

Moreover, there is no showing that defendant's claim of set off grew out of the purchases for which the plaintiff seeks to recover in this suit. Damages, such as are here sought to be set off, are unliquidated, and it was therefore incumbent upon the defendant to show that such damages grew out of the transactions for which the plaintiff was seeking to recover. (De Forrest v. Oder, supra; American Laundry Mach. Co. v. Barr, 176 Ill. App. 519) This he failed to do. The statement of set off was, therefore, properly stricken.

For the reasons heretofore assigned, the judgment of the Municipal Court of Chicago will be affirmed.

AFFIRMED.

254 - 21236.

In re Estate of LIVINGSTON T. DICKASON, Deceased.

WICKS STONE COMPANY,

Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

199 I.A. 640

Appellant filed its claim in the Probate Court of Cook County for $4,062.50, against the estate of Livingston T. Dickason, deceased, appellee. The claim was disallowed and an appeal taken to the Circuit Court of Cook County. The matter came on for hearing before a judge and jury. The court instructed the jury to return a verdict for appellee, which was accordingly done, and judgment was entered on the verdict against the appellant for costs, to reverse which this appeal is prosecuted.

For the purposes of this case, we shall assume that the following facts are established: That appellant was regularly incorporated about September, 1906, under the laws of Indiana with an authorized capital of $100,000. Its object was to quarry, buy and sell stone, etc.; the articles of incorporation were properly acknowledged by Livingston T. Dickason, deceased; said Dickason on the 25th of August, 1906, subscribed for $10,000 worth of stock in the corporation.

The record shows that the corporation began to transact business, bought real estate, 7 houses, $10,000

worth of machinery, and also built one house. There were 19 subscribers to the capital stock including Dickmson. The stock subscription list is dated August 26, 1906, and provides that the subscribers pay 50 per cent of the amounts set opposite their names, and that "we further agree to pay 20% of the amount subscribed at the time of subscription and the remainder by January 1st, 1907, as same may be needed and called for by W. W. Wicks." Afterwards calls were made on the subscribers to pay a portion of their subscription, and in accordance with said calls Dickmson made the following payments: January 18, 1907, 10 per cent, $500; February 14, 1907, 10 per cent, $500; April 18, 1907, 10 per cent, $500; August 15, 1907, 5 per cent, $250, making a total of $1,750. Payments were also made by other subscribers, some paying in full by services rendered the corporation, and others by turning over property to the corporation. Notes were given in payment or part payment by others. It is conceded that the corporation has ceased doing business, ~~but when is not shown~~. March 17, 1909, a meeting of the stockholders was held at its office, at which 9 stockholders were present. Dickmson, ~~however~~, did not attend the meeting, although notified. At that meeting a resolution was adopted, ~~which, so far as material,~~ is as follows: "It was, on motion, ordered that all stock in the company be issued April 1st, 1909 to all stockholders desiring to make final payment; that stockholders not desiring to make cash payments give note to company dated April 1st, 1909, for amount unpaid. Note to be due one day after date and bear interest at four per cent from date and to be non-negotiable. Further, that if assessment of over ten per cent on stock be made thirty days' notice shall be given. Stock to be issued upon payment of notes.

Certificate to be held by the company until note is finally paid."

The ~~witness Hiers,~~ the secretary of the company, testified that after the adoption of the above resolution, he talked with Dickason over the telephone, but it does not appear that the adoption of the resolution was mentioned in any manner; neither does it appear that any demand was ever made on Dickason after the passage of this resolution; nor that any demand was made on him after the payment of $250 on August 15, 1907. He died March 22,1913.

Counsel for appellee advance four reasons why the judgment should be affirmed, one of them being that nothing is shown to be due upon the alleged subscription agreement. Counsel for appellant state that "this suit is an attempt to require the estate of Dickason to bear its just proportion of the losses incurred by the corporation. * * * in order that the loss may be equalized among the stockholders and his estate may bear its just proportion of the loss." It was conceded that the corporation owes no debts and that any amount collected from appellee will be distributed amongst the stockholders so as to equate the losses. In order to determine what the just proportion of the losses incurred that should be borne by appellee is, it is necessary to have the amount of losses ascertained and determined; it is also necessary to show the amount due and unpaid, if any, from each subscriber; likewise it should appear what disposition, if any, has been made of the assets of the company. When these are determined, appellee's just proportion of the losses, if any, can be ascertained. The record fails to show any of these, and

the court therefore could not have done otherwise than instruct the jury to find for the appellee.

Furthermore, it appears from a reading of the resolution adopted by the stock holders, March 17, 1909, as above set forth, that "if assessment of over ten per cent on stock be made thirty days' notice shall be given." This is in accordance with the terms of the subscription list, which provided that payments be made as needed. No such assessment appears to have been made or notice given, and until this is done, nothing is due.

Finding no reversible error in the record, the judgment of the Circuit Court of Cook County will be affirmed.

AFFIRMED.

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Opinions

199

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